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IN THE

COURTS OF RECORD

OF THE

STATE OF NEW YORK

OTHER THAN THE

Court of Appeals and the Appellate Divisions of the Supreme Court,

INCLUDING THE APPELLATE TERM OF THE SUPREME COURT FOR THE HEARING OF APPEALS FROM THE CITY COURT OF NEW YORK AND DISTRICT COURTS, SPECIAL TERMS AND TRIAL TERMS OF THE SUPREME COURT, CITY COURT OF NEW YORK, COUNTY COURTS AND SURROGATES' COURTS, IN PURSUANCE OF LAWS OF 1892, CHAPTER 593.

ROBERT G. SCHERER, REPORTER.

VOLUME XXII.

ALBANY:
JAMES B. LYON, PUBLISHER.
1898.

Entered according to act of Congress, in the year one thousand eight hundred and ninety-eight

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* Appointed September 16, 1897, vice John Sedgwick, deceased.
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THE

MISCELLANEOUS REPORTS

OF THE

STATE OF NEW YORK.

COMMENCING DECEMBER, 1897.

FRITZ MORRIS, Respondent, *v.* GEORGE MURRAY, Appellant.

(City Court of New York, General Term, December, 1897.)

Work, labor and materials — To whom the credit was given.

Proof, made in an action brought to recover for work, labor and materials, tending to show that the plaintiff had formerly furnished goods to a hotel association at Long Beach upon the terms that he was to be paid therefor in board at the hotel; that, after he had declined to accept such an arrangement in the future, an employee of the association, who was also a hotel proprietor in New York city, ordered goods for the hotel at Long Beach upon his own credit; that the goods were charged and sent to the defendant personally; that he subsequently made repeated promises, by telegram, that he would pay the debt, and that, finally, when the hotel was about to close for the season, changed his position and claimed that the debt was that of the hotel association, is sufficient to justify a recovery by the plaintiff against the defendant.

APPEAL from a judgment in favor of plaintiff, entered on a verdict, and from an order denying a motion for a new trial.

The action is brought to recover $500, with interest for certain work, labor and materials furnished by the plaintiff.

Herbert C. Smyth, for appellant.

David Leventritt, for respondent.

CONLAN, J. The sole issue as conceded by the defendant was whether the work done and materials furnished should be charged

against the defendant or against the Long Beach Association, of which the defendant was an alleged employee. Besides being an employee of the association referred to, he was the proprietor of the Sherwood Hotel in New York city.

The plaintiff says he first called upon the defendant at the Sherwood Hotel with reference to the work in question, and was informed that it was then a little early in the season and that the plaintiff would hear from him later.

He called later upon the defendant, and subsequently accompanied him to Long Beach to make an examination of the proposed work, and as a result of this examination the goods were selected and sent to the plaintiff's place of business, and after being renovated, were reshipped to the defendant in boxes or barrels, there being four packages in all.

The plaintiff further says that a statement of the charges for the work to be done was made out and delivered to the defendant, and this is not disputed; and a discussion arising as to the figures in this statement, it was agreed that eight per cent. should be deducted from the amount for cash, but the same appears to have been restored afterwards for delay in payment.

The plaintiff then continues: "I asked Mr. Murray, for whom I was doing that work, and he told me I was doing it for him, and that he would pay me."

Plaintiff explains his reasons for this action by saying that he had done the work for the hotel association the year previous, and had taken the pay out in board for himself and family, and that, in a conversation with Mr. Ames, the president of the association, in reference to the work for the new year, he had been informed that it would have to be taken out in board, and for that reason he did not confer further with him on the subject, but made all of his subsequent arrangements with the defendant.

It is proper to say that the defendant's version of the matter seeks to negative the idea of any intention to incur a personal liability for this bill, but the plaintiff to corroborate his statement of the transaction, introduced in evidence a series of telegrams, sent by the defendant personally, with reference to the delays in payment of the bill and making repeated promises to pay the amount, and these telegrams, as the plaintiff insists, are an additional reason for insisting that the work was done for the defendant, and the plaintiff was to look to him for payment.

The defendant does not appear to have made any effort to induce the belief on the part of the plaintiff that the obligation to pay was one of the association and not of himself, for in all of these telegrams to the plaintiff, he uses, unqualifiedly and without stint, the expression, "I will pay," etc., until on the 20th day of August, 1896, when he suddenly changed the form of his communication by writing as follows, namely: "In behalf of the Long Beach Association, I cannot promise to make payments," etc.; and it appears that the hotel was to close for the season within a day or two thereafter, and did close on the 22d day of August, two days after the date of this letter.

There is a significance in these expressions, and dates and events that cannot escape notice. There does not appear to have been, in the mind of the defendant, any desire or intention on his part to repudiate the obligation as one, personal to himself, during all of the period down to within a day or two of the closing of the season's business, when, for the first time and for some unexplained reason, he changed the form of his communication to the plaintiff from the personal pronoun to the Long Beach Association, as we have already seen.

The goods have been received from the defendant direct, and had been reshipped to him, and so entered in the bill of lading, and we do not find anywhere in the record that there was any intimation given to the plaintiff down to the 20th day of August, when the letter, in behalf of the Long Beach Association, was written and sent, that the obligation to pay was to be treated as of the association, and not of the defendant.

The plaintiff's position, as he has asserted it, is, we think, strengthened by the fact that he did the work for the association the previous year, upon an agreement to board out the price. He personally declined to accede to these terms for the new year, refused to board out a new bill, and, as he plainly puts it, abandoned all negotiations with Mr. Ames, president of the association.

For the purpose, apparently, of showing the relations that existed between the defendant and the association, and to shift the defendant's liability, if that were possible, it was attempted to prove the terms of an alleged contract between them, but as the same was not brought to the knowledge of the plaintiff at the time the work was ordered, and he, not being a party to it, it was properly objected that it had no binding force on him with relation to the questions in dispute.

Thus, we see, that there was but a single question of fact to be determined between the parties, and this was fairly and properly submitted to the jury, under the exceedingly fair charge of the trial judge, and that question appears to have been determined adversely to the defendant.

For the reasons stated, we think the judgment should be affirmed.

O'Dwyer, J., concurs.

Judment affirmed, with costs.

Andrew Ennis, Respondent, *v.* William Dudley, Appellant.

(City Court of New York, General Term, December, 1897.)

Assault and battery — Former conviction of the plaintiff for an assault on the defendant.

Where a person brings an action against a police officer to recover damages for an assault and battery alleged to have been committed upon him by the officer, while taking the plaintiff from his residence, where he had had a disturbance with his wife, to the station-house, the officer cannot, in his own defense, prove the record of the conviction, in a Police Court, of the plaintiff for an assault made upon him while he was conveying the plaintiff to the station-house on the night in question, as the record of a conviction for a crime is not admissible in a civil action to prove the fact upon which it was rendered.

Appeal from a judgment in favor of plaintiff, entered on a verdict, and from an order denying a motion for a new trial.

Levy & Stuart, for plaintiff.

Francis M. Scott, counsel to the corporation, for defendant.

Conlan, J. This is an appeal from a judgment entered on the verdict of a jury, and from an order denying a motion for a new trial.

This action was for assault and battery, alleged to have been committed by the defendant upon the plaintiff, on the 9th day of December, 1895.

The defendant was a police officer at the time of the occurrence. In the course of the trial the defendant offered in evidence a Police Court record of the conviction of the plaintiff for an assault upon the defendant, and while he was conveying the former to the station-house on the night in question.

The officer had been called to the residence of the plaintiff to quell a disturbance between him and his wife, and its is charged by the plaintiff that on the way to the station-house, and while in charge of the defendant, as an officer of the police, the latter violently assaulted the former, and, by his violence, caused the plaintiff's leg to be broken.

The defendant denies the assault, and asserts in his own behalf, that the plaintiff struck him and then attempted to escape, and, in his efforts to get away, fell and thus occasioned the injury complained of.

In Sims v. Sims, 75 N. Y. 471-472, the court said upon this precise question: "Greenleaf states it as a general rule, that a record of conviction of a crime is not admissible in evidence in a civil action to prove the fact on which it was rendered, * * * and when offered for the purpose of establishing the fact of guilt there is a great weight of authority for the proposition that it is not admissible in a civil case."

Even if the record had been admitted, we fail to see that it would have had the effect to justify the assault committed by the defendant. There is no disputing the fact that the plaintiff's leg was broken in some manner, and while the plaintiff was on his way to the station-house. He was subsequently taken to the hospital where he remained for some weeks in consequence of the injuries he received.

There was, throughout the trial, a sharp conflict of evidence, and, upon the issues thus presented, the court left it for the jury to say what weight should be given to the evidence, as given by the witnesses for the plaintiff and the defendant, respectively.

It is true that the plaintiff was obliged to prove his case by a fair preponderance of evidence, but it is a general rule that the preponderance of evidence does not mean the greater number of witnesses, and it was, and always is, the peculiar province of the jury to examine the evidence and give to it the weight to which they think it is entitled.

We cannot say that they did not do so in the case at bar; and a verdict rendered upon disputed questions of fact should not be

disturbed unless for sufficient reason which the record may present, of undue influence, manifest prejudice or that the same is against the weight of evidence or the preponderance of evidence.

The charge to the jury was eminently fair to the defendant. The defendant's exception to the refusal to charge as in the fourth request is without force, and for the sufficient reason that the defendant himself testified that he did not use any force; in fact, that he did not strike him at all.

Nor, do we think, that the proposition contained in the sixth request would have been fair to the plaintiff, and its refusal was certainly not to the plaintiff's detriment; and, as it does not appear that the damages allowed are excessive, we are not inclined to disturb the verdict, and the judgment and order appealed from should be affirmed, with costs.

O'DWYER, J., concurs.

Judgment and order affirmed, with costs.

CHARLES O. PERRY, Appellant, *v.* NEWMAN ERB, Respondent.

(City Court of New York, General Term, December, 1897.)

Offer and acceptance — Arbitration as a condition precedent.

Where, upon a settlement of a claim against the property of his wife, a husband offers to pay a certain sum and the claimant accepts it, reserving, however, the claim of a third person which is stated to be "subject to arbitration," the claimant cannot recover the item of the husband where no arbitration has been had, nor can he recover at all where the facts tend to show that the arbitration, in view, was to be had, not between the husband and the claimant but between the claimant and the person who had furnished the goods to the house.

APPEAL from a judgment dismissing the complaint at the close of all the testimony.

Otis & Pressinger, for appellant.

Stern & Rushmore, for respondent.

CONLAN, J. The action is brought to recover the amount of a disputed item in an account between the plaintiff and one Theresa

Erb, the wife of the defendant, and which, it is claimed, the defendant became liable to pay upon an agreement for the adjustment and settlement of accounts between the original parties to the transaction. The contract was for the cost of certain alterations and repairs to a house owned by Theresa Erb, and the amount due was finally adjusted at the sum of $10,600, which the defendant agreed to pay in installments, and did pay them as they severally became due. There was, moreover, in addition to this sum of $10,600, an item of $315 for making and furnishing certain bookcases, and under the terms of settlement it is referred to in an exhibit, introduced in evidence by the plaintiff, in the following language: "Except item of $315, claim of Schacteler;" and, subsequently, the plaintiff wrote the defendant with reference to this very item in the following significant language: "On accepting offer to compromise and pay the original claim and an item of $315 of Mr. Schacteler's bill for bookcases in library, which is subject to arbitration." So, that we have the defendant agreeing to pay the claim at the compromised amount, except item of $315, claim of Schacteler, and the plaintiff's acceptance of the proposition in the language quoted above, as to the item in dispute.

Now, before any action could be maintained by the plaintiff as regards this particular item of $315, there was a condition precedent to be performed, and this upon the plaintiff's own construction of the alleged contract, and it became necessary to prove that arbitration had ensued or been offered before the action could be maintained.

If, as plaintiff contends, the arbitration was one to be had between the defendant and Schacteler, there was to be no liability until such arbitration had actually taken place or had been offered, and the proof was the same as in the former instance, and failure to present such proof tended to defeat the right of the plaintiff to recover against the defendant in this action. But we do not think that the evidence warranted the interpretation insisted upon by the plaintiff. Why should the defendant be subjected to the vexations and expense of arbitration concerning an item which he had especially excepted from the terms of settlement and to which the plaintiff had agreed, as seen by his letter accompanying the defendant's proposition for payment?

The language used was as forcible as it were possible to employ, yet we are asked to say that notwithstanding this very exception, the defendant was still to assume liability for Schacteler's claim.

If, therefore, the item was excepted by the defendant, is it not more reasonable to suppose that its dispute was to become a matter of arbitration between the plaintiff and Schacteler, for the defendant had not expressed any wish or intention of arbitrating it with any one. The dispute presented by the evidence upon this precise point was not of such a character as called for the consideration of the jury.

We think the case was correctly disposed of by the trial justice on the motion to dismiss the complaint.

The judgment, must, therefore, be affirmed, with costs.

O'Dwyer, J., concurs.

Judgment affirmed, with costs.

Anton Swoboda, Respondent, *v.* The Metropolitan Street Railway Co., Appellant.

(City Court of New York, General Term, December, 1897.)

Negligence — Measure of damages.

Where the evidence, given upon the part of a passenger injured by the alleged negligence of a street railway corporation while he was attempting to board one of its cars, tends to show that he was deprived of his earning power for five months, and that he suffered severe shock and severe pain, a verdict of $2,000 damages will not be set aside as excessive.

Appeal from a judgment in favor of plaintiff and from an order denying a motion for a new trial.

M. P. O'Connor, for respondent.

Henry A. Robinson, for appellant.

Conlan, J. The action is for negligence in the management of one of the defendant's horse-cars when the plaintiff was attempting to board it for the purpose of taking passage thereon.

It is conceded by the appellant that there are no questions of fact before this court, except that of excessive damages, and in the brief of its counsel the following appears: "It is unnecessary to

refer to the particular facts of the action, as, without doubt, the case upon the facts was one for the jury to pass upon." Nor, was there any exception to the charge by which the case was submitted to the consideration of the jury.

In the course of the charge the trial judge said: "The plaintiff's contention is that he was deprived of his earning power for five months, and that he suffered a severe shock and severe pain. You will determine whether or not such was the case and ascertain what should be the amount of the verdict."

It is the appellant's contention that the award of the jury was excessive, but just in what precise particulars we are unable to see. It was said in McIntyre v. Giblin, 100 U. S. 572, that the jury had a right to award fair compensation for the physical and mental suffering caused by the injury.

The amount of damages is particularly within the province of the jury, and unless they are so outrageous as to strike every one with the enormity and injustice of them, and so as to induce the court to believe that the jury must have acted through prejudice, partiality or corruption, the court on appeal will not interfere. Coleman v. Southwick, 9 Johns. 51-52. And in Minick v. City of Troy, 19 Hun, 253, the court, following the views of Mr. Chief Justice Kent, in the case last cited above, said: "But this question of damages is for the jury, and their determination of it must be accepted as final, in the absence of fair inference of improper influence. It is the prerogative of the jury to pass upon this subject, and their conclusion cannot be disturbed by the court on appeal, unless it be in some way made to appear quite manifestly that the result was reached through passion, partiality, prejudice or corruption." Bierbauer v. R. R. Co., 15 Hun, 564; Peck v. N. Y. Central & Hudson R. R. R. Co., 8 id. 286.

We are unwilling to say, that under all the circumstances, a verdict of $2,000, is excessive, and as there are no other questions of fact for review, presented by the record, the judgment must be affirmed.

O'Dwyer, J., concurs.

Judgment affirmed, with costs.

THE POTTER & PARLIN CO., Respondent, *v.* THE NEW YORK CENTRAL & HUDSON RIVER RAILROAD CO., Appellant.

(City Court of New York, General Term, December, 1897.)

Negligence — Horse, not tied, killed by a locomotive — Failure of engineer to stop.

Proof, made in an action brought to recover the value of a horse and wagon destroyed by a locomotive, tending to show that, although the horse was standing, untied, in the street, it was gentle and that its driver was near at the time of the accident, and that the locomotive, although moving so slowly that its engineer could have stopped it in a distance of thirty feet, did not, in fact, stop it at all, is sufficient to justify the conclusion that the engineer was negligent, and that the driver of the horse was not guilty of contributory negligence.

APPEAL from a judgment in favor of plaintiff, entered upon a verdict, and from an order denying a motion for a new trial.

Frank Loomis, for appellant.

Hutchinson & Newhouse, for respondent.

CONLAN, J. This is an appeal from a judgment, entered on the verdict of a jury, and from an order denying a motion for a new trial.

The action was brought to recover $187.95 damages for injury to plaintiff's property, alleged to have been negligently caused by a locomotive of the defendant, at Eleventh avenue, near Fifty-sixth street, New York city, March 20, 1895.

The complaint sets forth in two separate causes of action that on March 20, 1895, while a horse and wagon was standing in charge of the plaintiff's driver on Eleventh avenue, near Fifty-sixth street, in the city of New York, such horse and wagon was run into by an engine of the defendant, the horse was killed and the goods and wagon were lost.

The answer admits the accident; denies that it occurred through any negligence of the defendant, its agents and servants, and sets up that it occurred by reason of the negligence of the driver in charge of the horse and wagon at the time of the accident.

The contention of the appellant that it was negligence to leave a horse untied in a city street, is fully met and overcome by the authority of Wasmer v. Delaware, Lackawanna & Western R. R. Co., 80 N. Y. 212, where the court, Mr. Justice Earl, said:

"As to the negligence of the intestate. He was lawfully in the street, engaged in a lawful business. There is no absolute rule of law that requires one who has a horse in a street, to tie him or to hold him by the reins. It would doubtless be careless to leave a horse in a street wholly unattended without tying him to something. But it is common for persons doing business in streets with horses, to leave them standing in their immediate presence while they attend to the business, and it is not unlawful for them to do so. It is commonly safe so to do, and accidents are rarely occasioned thereby."

And, as in the case at bar, there was no proof that the horse, as in the case cited, was vicious, unsafe or unmanageable. On the contrary, the evidence was to the effect that the horse was gentle and easy to manage. The evidence is that the driver was near his horse and might expect in an emergency to control him; and the court further said, whether he acted prudently under such circumstances, in leaving his horse there, was a matter to be determined by the jury upon the evidence; and this ruling would seem to dispose of the appellant's exception to the refusal of the trial court to charge upon this precise question as requested.

Having thus disposed of the question as to whether the accident was caused by the contributory negligence of the plaintiff, we proceed to the other alternative — the question of the defendant's negligence.

The evidence upon this point was conflicting, plaintiff contending that the engineer of defendant was warned in time to have avoided the accident, while the evidence of the defendant is that no such evidence was given.

It was said in the case of Chrystal v. T. & B. R. R. Co., 105 N. Y. 164, that an engineer is not bound to stop his train the moment he sees some living object on the track. He has the right in broad daylight when his train is perfectly visible and its approach must be heard and known, to assume that the object — whatever it is — will leave the track in time to escape injury.

The defendant's witnesses asserted that the roadway was obstructed by other teams at the time of, or just prior to, the accident, and its engineer admitted that his train was proceeding at

the rate of about four miles per hour, and could have been stopped within the distance of the engine's length, or about thirty feet; and it was incumbent upon him to use every precaution that would assist him in avoiding the accident.

The fact that he proceeded with his train before coming to a stop before the occurrence of the accident, when, by stopping, the injury would have been prevented, he may be said to have risked the consequences, and that his act in so doing resulted in the injury. If this were so, then the defendant is clearly liable.

The question of the negligence of the defendant was fairly submitted to the jury upon all the evidence, and we are not inclined to disturb their finding. The amount of the damages is not in dispute upon this appeal, and, upon the whole case, we think the judgment should be affirmed.

O'DWYER, J., concurs.

Judgment affirmed, with costs.

JOHN F. WETTER, Respondent, *v.* WILLIAM H. LEWIS, GEORGE W. BOSKOWITZ, JOHN W. LYON and GEORGE O. HEFFTER, Impleaded with Others, Appellants.

(City Court of New York, General Term, December, 1897.)

Liability of trustees under section 7, chapter 319, Laws of 1848 — Judgment in action against corporation.

Where an action is brought against trustees of a hospital incorporated under chapter 319 of the Laws of 1848, to enforce their liability under section 7 of said act, for a debt of the corporation, a judgment-roll filed in a former action brought by the plaintiff against the corporation is inadmissible to prove the existence of the debt as against the trustees, and the burden is upon the plaintiff to show affirmatively and independently that the trustees authorized the contraction of the debt for which the former judgment was recovered.

APPEAL from a judgment, entered on the verdict of a jury, and from an order denying a motion for a new trial.

W. R. Spooner, for appellant Lewis, and others.

Langbein Bros. & Langbein, for appellant Heffter.

Z. Kurzman, for respondent.

CONLAN, J. The action is brought against the defendant Heffter and others, individually, by reason of an alleged liability, as trustees of the Woodstock Hospital, incorporated under the act of 1848, and the section of the act under which the defendants are sought to be held liable is as follows:

"Section 7. Liability of trustees.— The trustees of any company or corporation, organized under the provisions of this act, present at any meeting authorizing the contraction of any debt and acquiescing in the passage of any resolution or order authorizing the same, shall be jointly and severally liable for any such debt, provided a suit for the collection of the same shall be brought within one year after the debt shall become due and payable."

The plaintiff recovered a judgment against the Woodstock Hospital upon the obligation set out in the complaint, and upon the trial of this action, offered in evidence the judgment-roll in the former action, for the purpose of proving the debt in question, as is supposed, and by its nonpayment to fix the liability of the defendants, on the ground of their being trustees of the corporation at the time the debt was contracted.

The judgment was one taken by default, after service upon the defendant Kunitzer, as trustee. Kunitzer does not answer in the present action, but is used by the plaintiff as a witness in his behalf to prove the matters in controversy.

This judgment record was objected to on the ground that the plaintiff sues upon a statute, which provides for the liability of trustees, based upon indebtedness, to which they assented at the time of the contracting therefor, provided suit be brought within one year, and we think the admission of this judgment-roll in evidence for the purpose mentioned is error.

The judgment itself is merely the evidence of a debt against the corporation, but it is not evidence of the debt against the trustees individually.

Before this judgment could have been admitted for the purpose of establishing any proposition whatever, in an action of this character, there must have been proof that the defendant authorized the contraction of the debt for which the judgment was recovered. This is not an action affecting the liability of the trustees for failing to file a report, but is a special statutory provision in a special statute, and must be strictly followed, for in no other

way than as provided by the act itself can any liability be attached to these defendants.

We have seen that in order to maintain the present action, the defendants in their capacity of trustees must have authorized the contracting of the debt, for the recovery of which the action must be brought within one year thereafter.

Now, the only proof of any debt in favor of the plaintiff is this very judgment-roll, and for aught that appears to the contrary, the contracting of any debt had not been authorized prior to the recovery of this very judgment, nor by any fact alleged, and, therefore, its admission in evidence could only be accounted for upon the theory that it was *res adjudicata* between the parties, plaintiff and defendant; but it was not *res adjudicata*, and the defendants were not parties to that action, and had no day in court on the issue of goods sold and delivered, or of the promissory note sued upon, and it was not competent as evidence against them, for any purpose, in this form of action.

In the case of an action against trustees for not filing a report, it would be perfectly proper as evidence of a debt against the corporation, and when followed up by proof of the issue and return of an execution unsatisfied, the plaintiff is in position in that form of action, to prove by the records that no annual report had been filed, and then the trustees' liability, as individuals, attaches at once.

Here the case is far different. Aside from this very judgment-roll, there is not one scintilla of evidence in the case of any debt in favor of the plaintiff, and the plaintiff cannot claim any benefit from it, even though it be in evidence as an authorization for the contracting of the debt in question.

In Collins v. Hydron, 135 N. Y. 320, the court held that a former adjudication concludes a party only in the character in which he was sued, and here defendants were not even parties to that action, and they cannot thus be deprived of their right to dispute any of the allegations contained therein.

Its introduction, therefore, could not fasten upon them any liability; they are, each of them, entitled to their day in court, and as there was no evidence of a debt against them, there could hardly be a recovery.

The court charged the jury in substance that the judgment-roll was evidence of the indebtedness of the corporation, clearly showing the purpose for which it was admitted, but there

could not be any debt unless it had been previously authorized by the defendants in their capacity as trustees; and on this branch of the case we think the exclusion of evidence under plaintiff's objection, at folios 78, 80 and 87, where it was sought to introduce the minutes of the corporation for the purpose of showing that no meetings had been held, at which the defendants were present as trustees and voted to contract the debt in question, is error.

The plaintiff's witnesses were not able to fix the dates of the alleged meetings, and the minutes were the best evidence of the fact, and the defendants were clearly entitled to the benefit of any evidence which would have been adduced by their being admitted in evidence.

Whatever else may be said as to the merits of the case at bar, it is very clear from an examination of the record, that there was a total failure of proof, such as is required, to fix the liability for the debt in question upon these defendants.

Judgment reversed and a new trial ordered, with costs to the appellants to abide the event.

O'DWYER, J., concurs.

Judgment reversed and new trial ordered, with costs to appellants to abide event.

MAURICE STRANSKY, Appellant, *v.* ABRAHAM HARRIS, Respondent.

MAURICE STRANSKY, Appellant, *v.* NATHAN WEICHMAN and NATHAN RITTEMAN, Respondents.

(City Court of New York, General Term, December, 1897.)

Bail — Laches of judgment creditor in pursuing judgment debtor.

Where a judgment creditor does anything to prevent, or fails to do anything to procure, the proper service of an execution against the person of a judgment debtor, it is the duty of the court to protect his bail and, to that end, direct the issue of a further execution, and also to permit them bail, in an action brought against them by the judgment creditor, to surrender the debtor to the sheriff.

APPEAL from an order directing the issue of a new execution against the person and directing the surrender of defendant to the sheriff.

Epstein Bros., for appellant.

Charles I. Schampain, for respondent

CONLAN, J. This is an appeal from an order of the Special Term, which directed the plaintiff to issue a new alias or amended execution against the person of the defendant in action No. 1, to the sheriff of the city and county of New York, and that the defendant Nathan Weichman, in action No. 2, be permitted thereafter to surrender Harris to said sheriff in the manner provided by the Code.

The record before us presents some strange features. It appears uncontradicted, that the defendant Harris was at all times, during the past nine years, a resident at 116 Rivington street, New York city, and was still a resident there on the 24th of March, 1897, and, therefore, in the month of April, 1896, at the time the execution was issued against his person. He was such resident when served with the summons in action No. 1, and when the bail bond was executed; but, further, it also appears that at the time of the delivery to the sheriff of the execution against the person, the attorney was asked the address of the judgment debtor, and the same was not furnished to the sheriff, and he indorsed this statement upon the writ, and at the end of the sixty days, this execution was returned, indorsed, "Defendant not found."

There is sufficient evidence in the record going to show that the desire to find the defendant Harris was not very strong in the mind of the plaintiff's attorneys, and that they hardly expected to realize anything from him, but intended to rely upon an action against the sureties or one of them to collect the judgment.

That plaintiff attempts to excuse his inability to find Harris, by saying that they were not originally the attorneys in the action, is not sufficient, for they were evidently in possession of all the papers and proceedings in the case, and certainly could have possessed themselves of the precise information sought by the sheriff's office, had they so desired.

The very earnest effort also put forth by the former attorney of the defendant Weichman to prevent a possible surrender of Harris, does not appear to us as an act of good faith toward the bail, and was, doubtless, of some material assistance to the other attorneys in their effort to fasten a pecuniary liability upon the defendant Weichman.

Our attention is called by the attorneys of both sides to the case of Douglas v. Haberstro, 88 N. Y. 611-620, and §§ 599-601 of the Code, as an authority for their different contentions, and the learned judge at Special Term has put an interpretation upon all of these, which is in accord with our views on the subject.

The equities of the case appear to be entirely on the side of the defendant Weichman, and he is entitled to the full protection of the court.

There appears to us sufficient in the language of Mr. Justice Finch, in the case cited, to warrant the belief that where anything is done or left undone to prevent the service of the writ, or even, though, no fraud or collusion is alleged, it is a good defense in favor of the surety in an action upon an undertaking, and but for the action of the attorneys for the time being, the case could doubtless have been tried upon its merits, and the unpleasant state of things which have been presented to us in the record would hardly have occurred.

We are inclined to do full justice to the defendant, whom, we think, has not been fairly treated, and, for the reasons stated herein, the order appealed from must be affirmed. Order affirmed, with costs.

O'Dwyer, J., concurs.

Order affirmed, with costs.

Lizzie V. Villiers, Appellant, *v.* The Third Avenue Railroad Co., Respondent.

(City Court of New York, General Term, December, 1897.)

Negligence — Bill of particulars — Requisites — When denied.

A bill of particulars should not be ordered in an action, based upon the alleged negligence of a corporation operating a street railroad, and consisting in the collision of its motor with a carriage in which the plaintiff was driving, unless it specifically appears, from the motion papers, that the defendant has not the means of obtaining the information required, and that the defendant ought to have, whatever knowledge may be in the possession of the plaintiff, in order to prevent its being surprised upon the trial of the action.

APPEAL from an order granting the defendant's motion for a bill of particulars.

Leopold Leo, for appellant.

Henry W. Mayer, for respondent.

O'DWYER, J. The action is for negligence resulting in personal injury.

The complaint alleges: "That on or about the 18th day of September, 1896, between about noon and 1 o'clock in the afternoon, while plaintiff was driving in a carriage, drawn by a horse, along said Seventh avenue in a northerly direction, on the easterly side of said avenue, and was about to cross the southerly or eastbound track of the defendant in said One Hundred and Twenty-fifth street, defendant so carelessly and negligently moved an eastbound motor, moved, as plaintiff is informed and verily believes by compressed air, as to cause it to collide with the carriage the plaintiff was driving, and to injure her in her person and on the left side of her body, and particularly in the region of her ribs, neck and head, and causing her to suffer neurosthenia or nervousness, and otherwise causing her to suffer in her person, and rendering it impossible for her to attend to her usual duties, and also involved her in expenditures, medical treatment and medicines in all to her damage past, present and prospective, $2,000."

The answer consists of a general denial, and with it defendant served a demand for a bill of particulars.

The plaintiff did not serve the bill of particulars demanded, and after ten days had elapsed, defendant made a motion therefor, upon the pleadings and proceedings, and the affidavit of William H. Truman, assistant superintendent of the defendant company.

The affidavit, after stating the relation of deponent to defendant, the nature of the action, the date of issue, and the service of the demand for a bill of particulars, together with a criticism upon the statement of facts contained in the complaint, avers:

"That defendant intends in good faith to contest this claim; that it has a good defense, but that it is ignorant of the facts of the claim in the particulars hereinafter set forth, and is advised by counsel, that it is necessary and material to its defense of this action that it shall have a bill of particulars, which shall specify in detail, certain enumerated facts."

Upon the hearing an order was made, directing the plaintiff to deliver to the defendant a bill of particulars containing: "(1) The number of the car, if known to the plaintiff; (2) Extent of injuries and character to date, and medical bills to date; (3) Plaintiff's business and how long prevented following the same, and damages thereto to date. Such statement shall not prejudice future damages that may be suffered by plaintiff, and all proceedings on the part of the plaintiff be and they hereby are stayed until the terms of this order are fully complied with."

In Constable v. Hardenbergh, 76 Hun, 434, it was held that it must be shown by the moving papers that the defendant had not the means of obtaining the information required, and that it was necessary to have such knowledge as was within the possession of the plaintiff in order to prevent surprise upon the trial. It is clear from an examination of the affidavit of Mr. Truman that the defendant failed to comply with the requirements of this rule. Great caution should be exercised by the courts in requiring parties to furnish particulars in actions for damages resulting from negligence, and upon this record we are of opinion that the defendant was not entitled to the particulars directed in the order appealed from.

The order appealed from should, therefore, be reversed, with costs, and the motion denied, with $10 costs.

CONLAN, J., concurs.

Order reversed, with costs, and motion denied, with $10 costs.

WILLIAM NUTTALL, Plaintiff, *v.* ADOLPH SIMIS et al., Defendants.

(Supreme Court, Kings Trial Term, December, 1897.)

1. **Veterans — A tinsmith, paid by the day, may be removed arbitrarily.**
   The provisions of the Laws of 1886, chapter 119, as amended by chapter 577 of the Laws of 1892, providing that a veteran, who holds a salaried position, shall not be removed from it except for cause shown, and after a hearing had, do not apply to a tinsmith, a veteran appointed by a board of commissioners of charities and corrections and paid at a per diem rate.

2. County commissioners — Not liable in tort for removing such a veteran.

Semble, that where such commissioners remove such an employee, they are not liable to him as for a tort, as they exercise *quasi*-judicial functions in determining whether or not he is a veteran, and their discharge of him from a position, for which he had no contract, is not a direct injury to his person nor to his estate.

MOTION for a new trial, the complaint having been dismissed as not stating facts sufficient to constitute a cause of action. It alleged that the plaintiff was appointed as a tinsmith by the Board of Commissioners of Charities and Corrections of Kings county, a corporate board composed of defendants as commissioners, at the compensation of $2.75 a day; that there was permanent need for the employment of a tinsmith under the said board; that the plaintiff was an honorably discharged soldier of the late war of the rebellion, and, therefore irremovable from such employment except for cause after a hearing; that the defendants removed him without cause or hearing on January 13, 1894, and employed others in his stead. That he was restored to his place on April 10, 1896, by a peremptory writ of mandamus against the said board, issued upon a final order entered after trial of issues raised by a return to an alternative writ which he had obtained. Damages for such removal are prayed for.

Horace Graves, for plaintiff.

John A. Quintard, for defendants.

GAYNOR, J. By chapter 119 of the Laws of 1886, as amended by chapter 577 of the Laws of 1892, no honorably discharged soldier, sailor or marine, who "served as such in the Union army or navy during the war of the rebellion, or the Mexican war, and who shall not have served in the Confederate army or navy," who holds "a position by appointment in any city or county of this state, receiving a salary from such city or county," shall be removed except for cause shown after a hearing had. This in so many words relates only to salaried positions, and it has twice been held not to apply to persons employed by the day for wages.

(Meyers v. Mayor, 69 Hun, 291; Matter of Wagner, 7 App. Div. 203). If the adjudication in the mandamus proceeding against the corporate board, by which the plaintiff was restored to his place, necessarily embraced this question, nevertheless it is not binding in this action of tort against these commissioners individually. But in addition to such interpretation of the statute, I had in mind in dismissing the complaint other legal principles which seemed applicable. The dismissal of the plaintiff by the defendants involved a determination by them of the question of law whether his case came under this statute, granting that he was a veteran of the kind described and limited therein; and also of the question of fact whether he was such a veteran. The duty of so determining was *quasi* judicial, and for its performance the defendants cannot be held responsible in damages, even though they were intentionally, or even maliciously, guilty of misfeasance therein. Weaver v. Devendorf, 3 Den. 121. *Quasi* judicial functions lie between those which are judicial and those which are ministerial, and the boundary lines between these different zones are sometimes indistinct. But they seem to me visible enough here. Even in the case of bids for contracts, "ascertaining whether plaintiff was the lowest bidder," without regard to whether he is a responsible bidder, is said to be *quasi* judicial (East River Gas L. Co. v. Donnelly, 93 N. Y. 557), and the same is the case with assessors in assessing persons or property exempt from taxation, providing they are not without jurisdiction to act in the premises at all (Vail v. Owen, 19 Barb. 22; Brown v. Smith, 24 id. 419; Bell v. Pierce, 48 id. 51; Id., 51 N. Y. 12; Barhyte v. Shepherd, 35 id. 238; Parish v. Golden, id. 462; Throop on Pub. Officers, §§ 541, 738).

Without so deciding, I suggest another rule which may stand in the plaintiff's way. It is true that since the conflict between the cases of Adsit v. Brady, 4 Hill, 630, and Garlinghouse v. Jacobs, 29 N. Y. 297 was settled, the law has been that a public officer is liable in damages for any injury caused directly by his nonfeasance or misfeasance alike, to an individual in his person or property. (Hover v. Barkhoof, 44 N. Y. 113; Bennett v. Whitney, 94 id. 302; Bryant v. Town of Randolph, 133 id. 70). But such liability seems to be confined to direct injury to "person or estate" caused by the tort. (East River Gas L. Co. v. Donnelly, 93 N. Y. 561). It is doubtful if this case come under that head.

Was the plaintiff damaged in his estate by the tort alleged? He lost his place by it; but he had no contract for the place, nor is this an action for breach of contract. An official who refuses to give the advertising matter of his office to a newspaper which is entitled to have it by statute, and to be paid for publishing it (or who, on the same principle, takes it away from such newspaper), and wrongfully gives it to another newspaper instead, is not liable to an action for damages therefor. (Strong v. Campbell, 11 Barb. 135; People ex rel. Francis v. Common Council, 78 N. Y. 33). Why does not the same principle apply in the case of a refusal to employ or of a dismissal by a public officer of one entitled to preference of employment under him in the public service?

The motion for a new trial is denied.

Motion denied.

JAMES G. MUNDY, Plaintiff, *v.* MARY MOORE PRITCHARD and ROBERT K. PRITCHARD, Defendants.

(Supreme Court, Kings Trial Term, December, 1897.)

Bills and notes — After proof of fraud, the holder must show that he is a bona fide purchaser.

Where proof is made, in an action brought against the maker and indorser of a promissory note, that, although it was given by them for the specific purpose of being discounted and used in taking up a renewal note payable at a bank and upon which they were liable, it was, in fact, fraudulently diverted from that purpose by the person to whom it was first transferred and applied by him, after discount, to his own purposes, and that, after being protested for nonpayment by the discounting bank, its amount was charged by it to his account, and apparently was subsequently paid to it by him. A person who received the note from the discounting bank, after maturity and without indorsement by it, under a transaction, stated by the cashier of the bank in the form "that note (the one in suit) I gave to Mr. Mundy (the plaintiff)," if entitled to be regarded as having acquired title to the note, must, upon proof made of the fraudulent diversion, show the circumstances under which he came into possession of the note, and that he paid value for it.

ACTION upon a promissory note.

J. Woolsey Shepard, for plaintiff.

Alexander Campbell, for defendants.

WOODWARD, J. The plaintiff in this action, James G. Mundy, brings suit in this court to recover $2,000, protest fees and interest, upon a certain promissory note, made and indorsed by these defendants. Payment is resisted upon the grounds that the note was without consideration, and that the plaintiff, coming into possession of the same after it had been dishonored, received it subject to all the equities of the antecedent holders. The facts, in so far as they are necessary in the decision of this case, are either admitted or established by the evidence produced upon the trial, and they show that on the 1st day of September, 1892, Harry G. Barber, who had been carrying on the business of a dealer in coal in the city of Brooklyn, under the name of Alfred Barber's Son, entered into a copartnership with Pansy B. Pritchard, wife of the defendant, Robert K. Pritchard, for the purpose of dealing in coal, such firm being known as Barber & Pritchard. In the articles of agreement between them it was stipulated that Pansy B. Pritchard was to procure and pay for the services of Robert K. Pritchard "out of her proportions of the profits of said business," and he was to be known as the manager of the business. Barber contributed to the capital of the firm, the horses, carts, etc., at a valuation of $4,000, and Mrs. Pritchard paid in $3,000 in cash and a note for $1,000. It was agreed between the parties that in the event of any disagreement as to the affairs of the company, Barber was to have "full power and authority to settle the same," and each party was entitled to draw from the assets the sum of $200 per month, and no more, from the 1st of September, 1892. The $3,000 invested by Mrs. Pritchard was furnished by Mrs. Mary Moore Pritchard, one of the defendants in this action, and the mother of Robert K. Pritchard, the codefendant. Barber was an old and trusted friend of the family, and soon after the firm of Barber & Pritchard entered into business, Mrs. Pritchard, the defendant, had a conversation with Barber, in which she questioned the propriety of putting so much money into the business, as Robert K. Pritchard was not a bookkeeper or business man, and he was, therefore, at a disadvantage. Barber assured her that he would look after the money which she invested, and that as his

bookkeeper was an honest man, who was under obligations to him, everything would be all right.

In December, 1893, Mrs. M. M. Pritchard was informed by Barber that her son had withdrawn all of his wife's capital in the business, and on the 29th day of December, 1893, as the attorney in fact of her husband, Stephen Pritchard, she loaned the firm $4,845.83, the proceeds of a $5,000 note she had discounted to raise the money, and which she afterward paid. An account was opened with the firm in the name of S. Pritchard, and he was given credit for this amount, the sum being afterward reduced to $4,678.30, by reason of coal which was delivered and charged to his account.

During the month of September, 1895, Mrs. M. M. Pritchard made her accommodation note for $5,000 for the benefit of the firm, and had it discounted at the Bedford bank. She turned over the proceeds, as she supposed, to the firm, by check dated 18th September, 1895, drawn to the order of Alfred Barber's Son, for $4,899.17. The firm was to take care of this note. This note was renewed from time to time until in July, 1896, it was divided into two notes of $2,500 each, still in the Bedford bank, one due in two and the other in three months.

About the time of the maturity of the two months' note, Robert K. Pritchard told his mother of a conversation with Barber, in which it was proposed that Barber should get a note for $2,500 discounted somewhere in New York city, and with the proceeds take up the $2,500 note maturing on the 14th in the Bedford bank, with a view of improving her credit in that institution by the retirement of one of the notes which they were carrying in that bank. Mrs. Pritchard consented to this proposition, made her note for $2,500, and delivered the same to her son, who gave it to Barber, who indorsed it and pretended to try and have it discounted in New York city. He reported to Pritchard, and at another time to Mrs. Pritchard, that he could not get the note discounted, and promised to return the same to the maker. Accordingly the note in the Bedford bank was renewed. It appears from the evidence that Barber did, as a matter of fact, discount this note with the Oriental bank, in the city of New York, the proceeds passing to the credit of Alfred Barber's Son.

Some time prior to the 10th of December, 1896, and before the maturity of the note which he had discounted in New York,

Barber told Pritchard, who repeated it to his mother, that he was then in a position to get a note of $2,000 discounted in New York, and that if she would make a note for $2,000, and advance $500 for a few days, he would get the note discounted, and with its proceeds and the $500 in cash, take up a note of $2,500 about to mature in the Bedford bank. Relying upon these representations, Mrs. Pritchard gave her note, payable to the order of Robert K. Pritchard, for $2,000, together with her own check and a check which she had received from a third person, for enough to make up the $500 demanded by Barber. These notes and checks were delivered to Barber by Pritchard, and were by him used in the Oriental bank in meeting the then maturing note for $2,500, leaving the two notes still unprovided for in the Bedford bank, and the $2,000 note thus diverted from the object for which it was specifically given, is the note involved in this action. This note became due on the 10th day of March, 1897. Mrs. Pritchard was told by her son that Barber could not get it renewed and had asked if it could not be again put into the Bedford bank. Pritchard and his mother, believing that one of the Bedford bank notes had been taken up with the proceeds of the notes and checks given to Barber, were anxious to protect the $2,000 note in the Oriental bank, and with this end in view Pritchard went to the Oriental bank and endeavored to have the note held, without protest, until Barber, who was out of the city, should return. Failing in this, Mrs. Pritchard decided to go to the Bedford bank and raise the money necessary to take care of the note, and on this occasion, for the first time, learned that neither of the notes at the Bedford bank had been taken up. The cashier called her attention to the fact, and after she had drawn the money, she returned it to the Bedford bank, received her note back, and allowed the note in suit to go to protest. The note was protested on the 10th day of March, 1897. On the 17th day of March, 1897, the books of the Oriental bank showed that the account of Alfred Barber's Son was charged with the sum of $2,005,50, which is the exact amount of the note in suit, with protest fees and accrued interest to that time, which is the usual course of business in the city of New York in dealing with dishonored paper indorsed by a person or firm having an account with the bank. On the same day this charge appears against the account of Alfred Barber's Son, which is the account to which the proceeds of the note were originally credited. The

cashier of the Oriental bank testifies that "that note (the one in suit) I gave to Mr. Mundy." He also testifies that Mr. Mundy, who is an uncle of Barber, was introduced to him by Barber, and that he had never seen him to know who he was until he was so introduced by Barber. There is no evidence that the bank ever transferred this note for a consideration to the plaintiff; the bank makes no indorsement of the note, as is customary in the sale of commercial paper, nor is there anything to indicate that the bank ever held a title to this note, except in the ordinary course of its business in loaning money, the note being accepted as collateral, or as a guarantee of the repayment of the money loaned, rather than as property. On the contrary, it is shown that on the very day that Barber brought his uncle to the bank, and the day on which the cashier testifies that he "gave" this note to Mundy, the account of Alfred Barber's Son, which firm or company was known to the officials of the bank to be composed of Harry G. Barber, as testified by the cashier, was charged with the exact amount of this note, with its protest fees and interest to that date, and in view of all the surroundings, taking into consideration the well-known business usages of New York city banks, we are justified in the conclusion that Alfred Barber's Son, who was one with Harry G. Barber, paid this note, and when Nelson G. Ayres, cashier of the Oriental bank, "gave" this note to the plaintiff, he was acting as the agent of Barber, and could convey no better title to the note than at that time vested in Barber.

It is not necessary, however, for the purpose of deciding this case to establish this fact. The plaintiff came into the possession of this note after maturity; at a time when the law imposes on him the duty of inquiring into its antecedents, and the defendants having brought into question its validity, showing an adequate defense were the note in the possession of Harry G. Barber, the burden of proof is upon the plaintiff, to show that he came into possession of the note for a good and sufficient consideration, from one who had a clear title.

This rule, laid down by the early English cases, and asserted by Mr. Justice Story in his work on Promissory Notes, section 178, has in practice been made to extend even to notes purchased before maturity, where the defendant has interposed a defense. In the case of the First National Bank v. Green, 43 N. Y. 298, Judge Rapallo, delivering the opinion of the court, says:

"If the defendant had been permitted to prove, and had proved, the defense of duress, the burden would have been thereby thrown upon the plaintiff to prove that it gave value for the note, and the circumstances under which it was received.

"A plaintiff, suing upon a negotiable note or bill, purchased before maturity, is presumed, in the first instance, to be a *bona fide* holder. But, when the maker has shown that the note was obtained from him under duress, or that he was defrauded of it, the plaintiff will then be required to show under what circumstances and for what value he became the holder. The reason for this rule, given in the later English cases is, that where there is fraud, the presumption is that he who is guilty will part with the note for the purpose of enabling some third party to recover upon it, and such presumption operates against the holder, and it devolves upon him to show that he gave value for it."

In the case of the Farmers & Citizens' National Bank v. Noxon, 45 N. Y. 762, Judge Grover, in delivering the opinion of the court, says:

"The defendants proved that the note in suit had been diverted from the purpose for which it had been delivered to Smith by the maker as his agent. This cast upon the plaintiff the *onus* of showing that it was a *bona fide* holder, or had succeeded to the rights of such a holder." Wendell v. Howell, 9 Wend. 170.

This rule, which in a measure modifies the rule set forth in the case of the First National Bank v. Green, quoted above, has not been adhered to by the courts in later cases. In the case of Vosburgh v. Diefendorf, 119 N. Y. 365, Judge O'Brien, delivering the opinion of the court, sets forth the rule as laid down by Judge Rapallo in the 43d New York, and adds that "the rule established in this case has been adhered to in this court ever since, as will be seen from the cases above cited." In the case of American Exchange National Bank v. New York Belting Co., 148 N. Y. 698, Judge Gray, in delivering the opinion of the court, says that "the rule, in cases where the maker of a note shows that it was obtained from him by some fraudulent practice, requires the holder, who sues upon it, to show under what circumstances and for what value he became such." Citing First Nat. Bank v. Green, 43 N. Y. 298.

Accepting this rule, is was not necessary for the defendants in this action to establish that the note was transferred to the plain-

tiff by Barber. If it should be conceded that the bank had a good title to the note, and that it was acting for itself in delivering the same to the plaintiff in this action, it would still be necessary for Mundy, in the presence of the evidence of fraudulent conduct in putting the note into circulation, to establish that he was a *bona fide* holder for value, and the circumstances under which he purchased the same. The defendants prove, beyond any reasonable doubt, that the note in question was given for the purpose of taking up a note in the Bedford bank in Brooklyn, without increasing the liabilities of the maker or indorser; that it was delivered to Barber with this express understanding, and that it was discounted, the proceeds going to the account of Alfred Barber's Son, thus increasing the liabilities of the maker and indorser to the amount of $2,000 without their knowledge and consent. This being true, there can be no doubt that Barber could not recover were he the plaintiff in this action, and before his uncle can recover, it will be necessary for him to establish that he is, in fact, the *bona fide* owner of the note in suit, and that he secured his title for value from one who was a *bona fide* owner of the same.

"But," says Judge Allen, in delivering the opinion of the court in the case of Comstock v. Hier, 73 N. Y. 274, "when a note is made and indorsed to take up another note, to which the indorser is a party, its use is not a matter of indifference to the indorser, and if diverted, he may defend himself except as against a *bona fide* holder for value."

"The plaintiff did not satisfy this rule," says Judge O'Brien in the case of Vosburgh v. Diefendorf, 119 N. Y. 365, "by showing that he paid value for the note. It was necessary, in order to entitle him to recover, to go further and show that he had no knowledge or notice of the fraud with which the instrument was tainted from the origin. The large discount at which the plaintiff purchased the note, the circumstances attending the purchase, his knowledge of the original parties to the transaction, and especially of Henderson, one of the actors in the scheme which resulted in putting the note in circulation, were all proper subjects for the consideration of the jury, with reference to the plaintiff's innocence and good faith." This was a case in which the plaintiff had purchased the note before maturity, and from a third party. "But," says the court, in the same case, "in this state it must be regarded now as a settled rule that when the maker of nego-

tiable paper shows that it has been obtained from him by fraud or duress, a subsequent transferee, must, before entitled to recover on it, show that he is a *bona fide* purchaser."

Judge Peckham, in delivering the opinion of the court in the case of Northampton National Bank v. Kidder, 106 N. Y. 225, says:

"After maturity a purchaser for value is not a *bona fide* purchaser to the extent of being protected in his purchase (unless he succeeds to the rights of such a holder who became such before maturity), for the fact of nonpayment discredits the instrument and deprives it of any immunity which, before maturity, was secured to it in favor of a *bona fide* purchaser for value, without actual notice of any defect either in the obligation or the title."

In the carefully considered case of Morgan v. United States, 113 U. S. 499, Mr. Justice Matthews, speaking for the court, says:

"The title of the purchaser of overdue negotiable paper, such as a bill of exchange or promissory note, stands on the same footing as if it had been dishonored by a refusal to accept or pay, and had been put under protest. When transferred after it has become due, although not reduced to the rank of an ordinary chose in action, the legal title to which cannot pass by assignment or delivery, it carries on its face the presumption which discredits it, and deprives it of that immunity which, while the time for payment was still running, was secured to it in favor of a *bona fide* purchaser for value, without actual notice of any defect either in the obligation or title."

There is some effort on the part of the plaintiff to establish the theory that Robert K. Pritchard was overdrawn in his account with the firm, and that the note originally discounted at the Oriental bank, for which the note in suit was given in partial payment by Barber, was given to make good this deficiency. What effect this might have had, in so far as Robert K. Pritchard is concerned, had this fact been established by the books of the company and the testimony of the bookkeeper, who, it appears is still in the employ of Barber, it is not necessary now to consider. That Mrs. M. M. Pritchard, the maker of the note, and the defendant in this action, had no knowledge of the fact, and that the note was given for the express purpose of taking up a note in the Bedford bank, and with no intention of increasing her liabilities, is

well established. There is no rule of law better sustained than that which protects this defendant. In the case of Wardell v. Howell, 9 Wend., Justice Sutherland, delivering the opinion of the court, at page 172, says:

"This note has not answered the object for which it was indorsed by the defendant; it was not intended for the benefit of the makers generally, but for the special purpose of being substituted for, or enabling the makers to take up, another note which the defendant had indorsed for them, and which was about falling due. The indorsers did not intend to extend their responsibility for the makers, but to substitute the one note for the other. Where a note has effected the substantial purpose for which it was designed by the parties, an accommodation indorser cannot object that it was not effected in the precise manner contemplated at the time of its creation. But where a note has been diverted from its original destination, and fraudulently put in circulation by the maker or his agent, the holder cannot recover upon it against an accommodation indorser, without showing that he received it in good faith, in the ordinary course of trade, and paid for it a valuable consideration.

"That it was an act of gross fraud in Hughes to put this note in circulation, is not and cannot be denied; and the only question is, whether the plaintiffs took it in the ordinary course of trade, and paid for it a valuable consideration. The whole weight of authority and every consideration of justice and equity are against the plaintiffs upon this point."

Judge Earl, delivering the opinion of the court, in the case of Benjamin v. Rogers, 126 N. Y. 65, says: "But an accommodation maker of a note, or one who becomes surety upon a note, has a right to determine for himself what use shall be made of the note which he signs. He may impose material or immaterial conditions and terms, and no person, as against him, can get title to the note who takes it with full knowledge, in violation of the terms and conditions imposed upon it by him."

The note in suit was made and delivered by the defendants in this action for the specific purpose of taking up and canceling a certain note in the Bedford bank. This fact was known to Barber, and in negotiating the note and causing the proceeds to be diverted to his own use, he violated the conditions on which the note was issued. Having paid the bank the amount of this note, he could

not by any more jugglery transfer it to his uncle and give him a better title than he had himself, and the paper being thus transferred after its maturity and dishonor, the plaintiff, even had he purchased it of the bank, would be subject to all the equities of antecedent parties. In this case, however, the defendants show that the bank received its full compensation, and that the title of the plaintiff came from Barber, if at all, and it is as clearly shown that he never had a title under which he could recover from these defendants. In the case of Ocean National Bank of New York City v. Carll, 55 N. Y. 440, Chief Judge Church, delivering the opinion of the court, says:

"The only point presented for the consideration of this court is, that the plaintiff failed to prove that it was a *bona fide* holder for value of the note on which the action was brought. The possession of the note was sufficient *prima facie* to establish this, but when it was proved that the note was given without consideration, and fraudulently put in circulation, it was incumbent upon the plaintiff to prove the fact. It was sought to prove the fact by the president and discount clerk, but these officials did not occupy their respective positions at the time the note was discounted, and, could not, therefore, speak from personal knowledge as to some of the facts. Their evidence proved that the note was in the possession of the bank before maturity, that the usual course of business upon discounting a note was for the discount clerk to draw a check upon the president for the amount of the note, less the discount, and for the president and person procuring the discount to indorse it. Such a check was produced bearing even date with the note for $792. If this check had corresponded with the amount of the note ($500), less the discount, the evidence might have been sufficient to prove the discount, but being for a larger amount, it required further proof to show that the avails of this note were included in it."

If the same character of evidence which "might have been sufficient to prove the discount," is admissible to prove the payment of this note by Barber, then there can be no question that the bank was fully compensated, and that the plaintiff in this action came into possession of the note in suit after it had been dishonored, and when it was subject to all the defenses to which it would be subject in the hands of Barber, from whom he receives all the title that he has. In any event, the character of

the note having been brought in question, the plaintiff was bound to show that it came to him in the usual course of business, that he paid for it a valuable consideration, and that his title was derived from one who had a clear right to the note, free from all defenses. In this the plaintiff has wholly failed, and the complaint is, therefore, dismissed, with costs.

Complaint dismissed, with costs.

In the Matter of OPENING NINETY-FOURTH STREET, ETC.

(Supreme Court, New York Special Term, December, 1897.)

Condemnation of the fee of a street — Private easements — Measure of damages.

Where the owners of land abutting upon a street, shown on the city map of New York, authorized by chapter 115 of the Laws of 1807, and subsequently projected easterly to the exterior street, adopted by the city common council in 1859, have, by their conveyances, among each other so dealt with the fee in the street, that, while retaining title to it, they have reciprocally created private easements in it, they become, in the absence of the requisite clear proof of a dedication of the fee in the street to the public use, entitled, upon an absolute condemnation of it by the city, to damages which, while necessarily more than nominal, cannot be the full value, but only such value as it has, subject to the existing private easements.

PROCEEDINGS to condemn land for street opening purposes.

William C. De Witt, for Henry W. Sage.

John C. Shaw, for property owners assessed.

Truman H. Baldwin, for Hancke Hencken.

Francis M. Scott, counsel to the corporation (John P. Dunn, of counsel).

BEEKMAN, J. The commissioners have awarded to the owners of the fee of the land included within the lines of Ninety-fourth street, between First avenue and high-water mark, the full value of the property. Objections have been filed to the report by the

city and other parties affected by the assessment which has been laid to meet the awards, and the questions thus raised have been discussed on this motion, which is made to confirm the report.

It is claimed by the objectors that only nominal awards should have been made on the ground that there has been an actual dedication of the land lying in the street to public use, or, if that be not so, that the land has been subjected to the charge of private easements in favor of certain persons owning property abutting on the street west as well as east of the First avenue, which are coextensive with the ordinary uses of a public street. As the adoption by the city of Ninety-fourth street from First avenue to the exterior bulkhead line as a street which it was proposed to open at some future period is called in question, it is sufficient to say that the proofs clearly show that it was laid down on the commissioners' map authorized by the act of 1807, extending to the shore line of the river, and was subsequently projected to the exterior street adopted by the common council in 1859, as appears from a map known as the Southard map, which was approved by that body. It appears that prior to the conveyance next referred to one Edward Roberts owned a large parcel or tract of land, which included the premises in question and other property adjacent thereto. In 1861 he conveyed to Henry W. Sage and William G. Grant the following parcels, namely: The block bounded by First and Second avenues, Ninety-fourth and Ninety-fifth streets, and another piece bounded by First avenue on the west, Ninety-fourth street on the south, and the Harlem river on the north and east. The deed, also, in terms, conveyed "all the right, title and interest of the parties of the first part in and to the adjoining streets to the center thereof." The title to the northerly half of Ninety-fourth street thus vested in Sage and Grant, while the title to the southerly half continued in Roberts, together with the adjacent land to the south of which he was the owner.

In 1876 an action for the partition of the property so conveyed was brought by Sage, which resulted in a judgment under which an actual partition was made, and pursuant thereto quitclaim deeds were exchanged between the parties in conformity with the division so made. In the division a parcel on the north side of Ninety-fourth street, extending from First avenue east to the river, was allotted and conveyed to Sage. The land lying in Ninety-fourth street, however, was not the subject of allotment or conveyance, the

description of the property partitioned in each case carrying the bounds to the sides of the streets and avenues, which are explicitly named, no mention being made of the interests which both parties doubtless enjoyed in common in the land within the street to the center thereof.

In 1886 Roberts conveyed the land owned by him on the south side of Ninety-fourth street to one Willenbrock, bounding it by the side of said street, and granting also in terms all his right, title and interest to the southerly half of said street, and immediately thereafter Willenbrock conveyed an undivided half of the property thus acquired to one Hancke Hencken.

It is claimed that the parties thus owning the fee of Ninety-fourth street have dealt with it in such a way as to work a dedication of the same to the public use, and the cases of the Matter of Thirty-ninth Street, 1 Hill, 191; Wyman v. Mayor, 11 Wend. 486, and Matter of Lewis Street, 2 id. 472, are relied upon to sustain this contention. It is true that these cases apparently hold that where a property owner sells a lot of land, bounding it upon a street, which was laid out on the map of 1807, a dedication of the land lying in the street to the public use for street purposes results, which leaves in the owner the barren fee, entitling him to only nominal compensation when the street is legally opened. But the courts have since discredited these cases to an extent which very seriously impairs their authority.

The whole subject is elaborately discussed by Mr. Justice Ingraham in the Matter of One Hundred and Sixteenth Street, 1 App. Div. 436, where, in giving the opinion of the court, he says (p. 445): "We have now three late decisions of the Court of Appeals, which taken together, we think establish certain rules that should be applied to cases of this kind. Thus, we may say that a grant of land bounded upon a street of which the fee is in the grantor, whether by the terms of the grant the fee of the street would be included or not, does not of itself amount to a public dedication of the street; that the owner of property abutting on a street, who owns the fee of the street subject to an easement granted to private individuals, is entitled to substantial damages when the fee is taken by a municipality for a public street; that where there exists a private easement to use the street, the owner of the fee of the street subject to such easement is entitled to nominal damages only, where the fee is not taken, but only an ease-

ment for the public, as no greater right was taken by the public than he had before granted to his grantees; and where the owner of property on both sides of a street or highway has conveyed all of his property bounded on the street to grantees who have thereby acquired an easement in the street for use as a street, he is entitled to the value of the property taken subject to the private easement which already incumbers the property, which value is merely nominal. See City of Buffalo v. Pratt, 131 N. Y. 299; Matter of Village of Olean v. Steyner, 135 id. 346, and Matter of Adams, 141 id. 300."

I am of the opinion that upon the facts of this case disclosed by the record there has not been a dedication of the land in question to the public use. Whether there has been a dedication or not is a question of intention, and the evidence of such an intention must be clear and unequivocal to support such a conclusion. The claim rests substantially upon the reference to the street contained in the deeds conveying the adjacent lands, but as we have seen this is not now considered sufficient. Matter of One Hundred & Sixteenth Street, *supra;* Matter of Department of Public Works, 48 Hun, 488.

But the land in question is affected by certain private easements in favor of the abutting property owners which spring out of the relation established by the acts of the parties in dealing with the abutting property. Matter of Eleventh Ave., 81 N. Y. 436. In that case the court says (p. 447): "But the authorities cited fully establish that, without making such a dedication to the public a grantor may, by selling lots and describing them as bounded on a street running through his own land, create an easement in the land called a street in favor of his own grantees, and that although the fee of such land remains in him it is incumbered by that easement."

The easement in such a case is one which extends over the entire width of the street, and may be defined as a perpetual right to the free and unincumbered use of the so-called street for light, air and access. Where the grantor is the owner on both sides of the street, the grant of this easement in favor of the grantee of one or more parcels is not exclusive, but the land lying within the lines of the street become chargeable with a similar easement in favor of his subsequent grantees of other parcels conveyed in like manner, even though in the previous deeds the grantor has conveyed his right, title and interest in the adjacent street to the center line of the

same. The land within the street lines so granted is to be deemed as conveyed subject to the uses for which the so-called street or road exists, and, therefore, subject to the right of the grantor and his subsequent grantees owning or acquiring the remaining abutting parcels to use the same for such purposes. In other words, as between the grantor and his grantee, although not with respect to the public, the land lying within such limits becomes impressed with all the ordinary characteristics of a street. Bissell v. N. Y. Cent. R. R. Co., 23 N. Y. 61.

When, therefore, Roberts conveyed to Grant and Sage the land east of First avenue on the north side of Ninety-fourth street, in the manner above stated, together with his right, title and interest in the adjoining street to the center thereof, they acquired an easement of the nature above described in all the land lying within the limits of Ninety-fourth street east of First avenue, and the land conveyed to them within the street lines became also impressed with a similar use in favor of Roberts, who continued to own the property on the south side of the street and the remaining land within the street lines. Such, also, I think, was the manifest intention of the parties as disclosed by the situation of the property and their manner of dealing with it. When Roberts subsequently conveyed his remaining property east of First avenue to Willenbrock, the latter succeeded to his grantor's rights in the street, and also became subject to the burden of the easements therein in favor of Grant and Sage, so that the situation now is that Sage, who seems to have acquired the Grant interest, is the owner of the north half of the street in severalty impressed with the easement of Willenbrock and his cotenant Hencken, while the latter are the owners of the south half of the street subject to a similar easement in favor of Sage. They are, therefore, entitled to substantial damages for the taking of the fee, but only such as may be measured by the value of the fee subject to the private easements referred to. Matter of One Hundred & Seventy-third Street, 78 Hun, 487. In the case cited the court says (p. 491): "In the case of the City of Buffalo v. Pratt, 131 N. Y. 293, it was distinctly held that where the ownership of the fee of land in the street is taken from the adjoining owner by legislative authority, the owner is entitled not merely to nominal damages, but to such substantial damages as may be ascertained by measuring the effect upon the value of his remaining property of the loss of the fee of

the street. And this rule was based upon the fact that the ownership of the fee of the land in the street by an adjoining owner vests in him certain rights of which he is deprived by the taking of the fee of the land, even for street uses. This principle seems to cover the case at bar."

It also covers the case under consideration. In determining such damages it must, therefore, be considered that the land taken is incumbered with an easement which prevents exclusive occupation, and forbids any surface construction or other use inconsistent with the uses of a right of way. The case at bar is not to be confounded with cases where the public authorities are seeking to condemn a public easement only. Here, as in other cases in New York city, the fee is sought to be taken. The distinction is pointed out by Judge Finch in Village of Olean v. Steyner, 135 N. Y. 341, where he says (p. 347): "In the case of city streets, where, under the statute the fee is taken, we have recently held that substantial damages should be awarded (City of Buffalo v. Pratt, 131 N. Y. 297), but here the fee is not taken, but an easement for a highway only, which is merely the equivalent of the private easement displaced. The change alters the control but does not increase the burden."

It is claimed that under the authority of the Matter of Adams, 141 N. Y. 297, the owners here are entitled to only a nominal award, but an examination of the opinion in that case shows that the court apparently proceeded on the assumption that the proceeding in hand involved a mere exchange of a public for a private easement, and not the transfer of the fee; and the case of Village of Olean v. Steyner, *supra*, is quoted in support of the reasoning of the court. It can, therefore, hardly be taken as overruling the authority of City of Buffalo v. Pratt, *supra*, which Judge Finch carefully distinguishes from the one then under consideration. Furthermore, it has been held in this department that the facts of the case in the Matter of Adams were of such a character as to render it inapplicable to cases similar to the one under consideration here. Matter of One Hundred & Seventy-third Street, 78 Hun, 487.

The record in the case at bar shows that the commissioners treated the easements which affected the land lying within Ninety-fourth street as practically nonexistent, and awarded the full value of the fee as if it were not so incumbered. In so doing they adopted an

erroneous principle, which requires the court to refuse the motion to confirm, and to return the report to them for reconsideration. While holding that the owners are entitled to more than a mere nominal award, I also hold that the measure of damage must be the value of the property taken subject to the private easement referred to, or as is said by Mr. Justice Van Brunt in the Matter of One Hundred & Seventy-third Street, *supra*, "such damages as may be ascertained by measuring the effect upon the value of his (the owner's) remaining property of the loss of the fee of the street."

The claim that the easements in question have been lost by adverse possession is unsupported by the facts and the law of the case. Matter of Department of Public Parks, 53 Hun, 556.

In concluding, I may also say that in my opinion, owing to the manner in which the property owned by Sage and Grant was acquired, held and partitioned by them, similar easements over Ninety-fourth street east of First avenue have attached in favor of their grantees of portions of the lands acquired by them from Roberts between First and Second avenues.

The motion to confirm is denied, and the report remitted to the commissioners for their further action, in conformity with the views here expressed.

Ordered accordingly.

HENRY G. BURLEIGH, Plaintiff, *v.* LEANDER A. BEVIN and Others, as Executors, etc., of ALBERT C. CHENEY, Deceased, Defendants.

(Supreme Court, Washington Special Term, December, 1897.)

Single joint adventure — Action for contribution for a share of a loss suffered — Prior accounting unnecessary.

The fact that three persons entered into a single joint-stock speculation, in which they were to share and bear profits and losses equally, does not make them partners in a strict sense; and, although there has been no accounting had between them, one, who has borne the whole loss, may maintain against the executor of a deceased associate, an action at law to recover one-third of the loss, and this, although the remaining associate has not been made a party to the action.

DEMURRER to complaint on the ground that it does not state facts sufficient to constitute a cause of action, and that there is a defect of parties defendant.

Frank E. Smith, for plaintiff.

William V. Simpson, for defendant.

MCLAUGHLIN, J. The plaintiff brings this action to recover of the defendants one-third of the loss alleged to have been sustained by him in a stock speculation in which he, Albert C. Cheney (defendants' testator) and Warner Miller were equally interested. The defendants have demurred to the complaint on the ground that it does not state facts sufficient to constitute a cause of action, and that there is a defect of parties defendant. The complaint charges that Cheney, Miller and the plaintiff entered into an agreement to buy, for the purpose of reselling at a profit, certain stock of the Chicago, Milwaukee & St. Paul Railroad Company; and that the profits, if any were realized, were to be equally divided between them; and that the losses, if any, were to be borne in the same manner; that in pursuance of the agreement purchases were made with money furnished or provided by the plaintiff and the stock thereafter sold and a loss sustained in the sum of nine thousand nine hundred and seventy-three dollars and seventy-two cents ($9,973.72), which was paid by plaintiff; that no part of this sum was paid by defendants' testator, and by reason thereof the plaintiff is entitled to recover against the defendants one-third of such loss, viz., three thousand three hundred and twenty-four dollars and fifty-seven cents ($3,324.57).

By demurring, the defendants admit not only every material fact stated in the complaint, but also every fact that can reasonably and fairly be implied therefrom; they admit the agreement, the purchase and sale of the stock; that all of the money was provided by plaintiff; that a loss was sustained in the amount named; that this loss has all been paid by plaintiff, and that, under the agreement, one-third was to be paid by their testator. They also admit that this constitutes the whole transaction, and that it is closed. Admitting all these facts, does the complaint state a cause of action? The correct answer to be given to this inquiry depends upon the answer to be given to the further inquiry, and that is,

whether one party to a transaction similar to the one set out in the complaint can maintain an action at law to recover a proportionate share of the loss sustained before there has been a final settlement of the accounts between all the parties to it? It is, undoubtedly, the general rule that one partner cannot maintain an action against his copartner for any matters growing out of the partnership affairs, until there has been a final settlement of the accounts between them. The reason of the rule is obvious — until all the affairs of the partnership have been adjusted there can be no adjudication of the complete rights of the parties as to any single transaction connected with it. In other words, until an account is taken the court is not in a position to do full justice between the parties. But did the transaction in question, under the agreement referred to, constitute the parties to it partners in such a sense as to bring them within the reason of the rule above referred to? I think not. There was no general partnership in the sense in which that word is usually understood. The agreement was simply to share the profits and bear the losses of a single transaction. There were not and could not be any joint debts or mutual accounts to be adjusted. After the sale of the stock nothing remained to be done except to divide the profits or contribute to the losses, and no good reason can be assigned why an action at law, under such circumstances, should not be maintained to recover a proportionate share of the losses sustained or profits made. Musier v. Trumpbour, 5 Wend. 274; Fry v. Potter, 12 R. I. 542; Wann v. Kelly, 5 Fed. Repr. 584; Wheeler v. Wheeler, 111 Mass. 247; Canfield v. Johnson, 144 Penn. 61. Thus, in Fry v. Potter, *supra*, where an action was brought to recover one-third of a loss sustained in a land speculation, in which three parties were equally interested, the court, in affirming the direction of a verdict, said: "We think the instruction was right. There was no general partnership, but only an agreement to share the gains and losses of a particular adventure, the entire capital for which was furnished by the plaintiff's testator. There were no joint debts or liabilities, and no mutual claims subsisting to be adjusted. The transaction was closed and the losses ascertained. Nothing remained for the defendant to do but pay his share of them. The case is not intrinsically distinguishable from an ordinary case in *assumpsit;* and, even without precedent, we should have little difficulty in maintaining the action. There are, however, respectable prece-

dents for it." And to the same effect is Wann v. Kelly, *supra*, where the plaintiff, defendant and a third party entered into an agreement to sell 300 shares of stock of the Northern Pacific Railroad Company short, and the defendant managed the speculation and sold, and the transaction resulted in a net profit of $2,000. The plaintiff sued for his one-third and the question was there raised, as here, that the action could not be maintained until after an account had been taken, but the court said: "It is also urged by the defendant that the plaintiff, if entitled to a share of the profits, can only enforce his claim in equity. I think an action at law gives adequate relief. The parties were engaged in a single venture, and the defendant, having appropriated the proceeds to his own use, made himself debtor to the plaintiff." It seems to me, therefore, upon principle and authority, that the action is well brought and that the complaint states a cause of action. If the complaint does state a cause of action, then Miller is not a necessary party.

But it is suggested that Miller may make a similar claim against defendants, and, therefore, he ought to be made a party to the action. There are two answers to this suggestion, (1) If the facts stated in the complaint are true he cannot make a valid claim; (2) If he does make such claim then the defendants' remedy is by interpleader. Equity Gas Light Co. v. McKeige, 139 N. Y. 237.

The demurrer is, therefore, overruled, with leave to answer on payment of costs.

Demurrer overruled, with leave to answer on payment of costs.

HORACE SALISBURY et al., Plaintiffs, *v.* THE COUNTY OF WASHINGTON, Defendant.

(Supreme Court, Washington Special Term, December, 1897.)

Property destroyed by mobs or riots — Proof under section 21, chapter 685, Laws 1892 — Statute of Limitations.

Persons who seek to recover, under Laws of 1892, chapter 685, section 21, of a county damages for property destroyed by a mob or riot, must prove compliance with all the statutory requirements; and where they fail to prove that they notified the "sheriff of the county of a threat or attempt to destroy or injure their property by a mob or riot,

immediately upon acquiring such knowledge," or in the alternative, that they did not have such knowledge until the property in question was injured, and where they do not bring their action within three months, as required by the statute, it cannot be maintained.

MOTION, upon the minutes, to set aside a verdict, and for a new trial.

Robert O. Bascom (O. A. Dennis, of counsel), for motion.

Ostrander & Salisbury, opposed.

MCLAUGHLIN, J. The plaintiffs' right to recover is based upon the provisions of section 21, chapter 685 of the Laws of 1892, which reads as follows:

"A city or county shall be liable to a person whose property is destroyed or injured therein by a mob or riot, for the damages sustained thereby, if the consent or negligence of such person did not contribute to such destruction or injury, and such person shall have used all reasonable diligence to prevent such damage, shall have notified the mayor of the city, or sheriff of the county, of a threat, or attempt to destroy or injure his property by a mob or riot, immediately upon acquiring such knowledge, and shall bring an action therefor within three months after such damages were sustained."

Under this statute, to entitle a plaintiff to recover, he must allege in his complaint and prove upon the trial: (1) That the damages for which a recovery is sought were occasioned by a mob or riot; (2) Without his consent or negligence; (3) That he used all reasonable diligence to prevent such damage; (4) That he notified the mayor of the city, or sheriff of the county, of a threat or attempt to destroy the property injured, immediately upon acquiring such knowledge; (5) The commencement of the action within three months after the damages were sustained.

The plaintiffs in this action, appreciating the force of the above-mentioned statute, set out these necessary allegations in their complaint. Did they prove them upon the trial? After a careful examination of all of the evidence offered, I am satisfied that they failed in at least two particulars: (1) They failed to prove that they notified the sheriff of the county of a threat or attempt to destroy their property, immediately upon acquiring such knowl-

edge, or that they did not have such knowledge until the property was injured; (2) They failed to prove that they brought their action within three months after the damages were sustained. From anything that appeared on the trial these plaintiffs may have had knowledge of the contemplated attack sometime prior thereto; and, if they did and failed to disclose it to the sheriff of the county, then, under the wording of the statute, they were not entitled to recover. The other ground named is equally fatal to a recovery — the provisions of the statute as to bringing the action within three months after the damages are sustained is connected with and made a part of the other requirements of the section; it is a condition precedent to a recovery.

For these reasons I think the motion must be granted.

Motion granted.

In the Matter of the Application of RICHARD J. PUGH to Lay Out a Highway in the Town of Paris and Assess the Damages Therefor.

(County Court, Oneida County, December, 1897.)

1. **Highway Law — Award.**

Where commissioners, appointed to lay out a highway, view the premises, under direction of section 81 of the Highway Law, their own judgment enters into the amount of the award made for damages and this will not be set aside as against the evidence.

2. **Same — Defects in proceedings, when not available.**

The objection that a petition and notice, in such a proceeding, are insufficient, should be raised by a motion to set aside the order appointing the commissioners and should not be presented, in the first instance, after the merits have been litigated.

3. **Same — Rules of evidence.**

Proceedings, had before such commissioners, need not be governed by the technical rules of evidence which prevail in a court of record.

4. **Same — Valuation of owner, based on a future use.**

Commissioners are not bound to adopt a valuation which an owner puts upon his property, he having in a view a special use to which he means to apply his property at some future time.

MOTION made in behalf of David J. Davis to vacate and set aside the decision of commissioners made in the above-entitled matter in favor of laying out the proposed highway and awarding damages. The proceeding was commenced, pursuant to the Highway Law, in the summer of 1896. Albert T. Wilkinson, Julius A. Day and Albert P. Seaton were appointed commissioners. The commissioners personally viewed the premises and took a large amount of evidence. The decision was filed in July, 1897.

Wm. A. Matteson, for contestant and motion.

L. D. Edwards, opposed.

DUNMORE, J. The evidence taken in this matter clearly sustains the finding of the commissioners as to the necessity of the highway in question and as to the amount of damages awarded. The statute (Highway Law, § 81) makes it the duty of the comissioners to personally examine the highway described in the application and, therefore, doubtless contemplates that the amount of damages to be assessed shall be determined at least in part by their own judgment.

In Matter of N. Y., W. S. & B. R. R. Co., 37 Hun, 317, the court said: "The commissioners viewed the premises and had means for making up their judgment not possessed by this court, and which could not be returned to us."

It was held in Crouch v. Gutmann, 134 N. Y. 45 (p. 55), that where by stipulation of the parties a referee was given an opportunity of viewing the premises and making personal inspection of the work and he availed himself of such opportunity, that his decision could not be set aside as against the evidence.

I do not think the point that the commissioners had no jurisdiction is well taken. There was a substantial compliance with the statute, and besides, if the petition and notice were insufficient, that point should have been raised by motion to set the order appointing commissioners aside. It would be a great waste of time, and, therefore, I think, poor practice to permit a party after objection to the jurisdiction of the court to litigate upon the merits the question involved, and then, if defeated, avail himself of such objection to defeat the decision, when the whole question could have been raised by a motion and the trial avoided. Willoughby v. Carleton, 9 Johns. 136; Seymour v. Bradfield, 35 Barb. 49; Dunham v.

Heyden, 7 Johns. 381; Tifft v. Culver, 3 Hill, 180; Fanning v. Trowbridge, 5 Hill, 428.

I agree with contestant's counsel that several erroneous rulings were made by the commissioners during the progress of the trial. I do not, however, think that the statute contemplates that commissioners appointed in proceedings to lay out highways shall be governed by the technical rules of evidence applied in courts of record. The statute contemplates the appointment of commissioners who have a practical knowledge of the value of lands proposed to be taken and the damages caused thereto, rather than a practical knowledge of the rules of evidence.

In Matter of N. Y., W. S. & B. R. R. Co., 37 Hun, at page 318, the General Term of this department defined the rule as follows: "Courts will not disturb appraisal of damages for technical errors in the admission or rejection of evidence, unless it is apparent that such errors led to unjust results. The awards will be sustained unless the commissioners have clearly gone astray and disregarded legal principles."

I cannot say upon this record that those rulings led to unjust results. It was urged upon the part of contestant that he had for some years contemplated erecting a building upon this land, and that it was valuable for building purposes. The commissioners had the right to take the property as it was and consider the uses previously made and those that were apparent. They were not bound to take a value put upon it by contestant for a special use which he testifies that he contemplates making of the property.

The contestant's counsel lays great stress upon the fact that evidence of the cost of fencing was excluded. Section 122 of the Highway Law provides: "Whenever a highway or private road shall be laid along the division line between lands of two or more persons, and wholly upon one side of the line, and the land upon both sides is cultivated or improved, the persons owning or occupying the lands adjoining such highway or road, shall be paid for building and maintaining such additional fence as they may be required to build or maintain, by reason of the laying out and opening such highway or road." The above statute is to be taken in connection with the statute requiring adjacent owners of land to maintain division fences, but has no application to lands adjoining railroads, as the latter are required to maintain all the fences along their line.

An adjacent owner is not *required* to maintain any fence along the highway. The contestant would not, therefore, be *required* to maintain any additional fences. He might find it to his advantage to do so, and, I think, it would have been entirely proper to have received the evidence in that view, but it would not have been proper to have received it upon the theory that he would be *required* to maintain a fence along the highway; nor can I say that the commissioners did not fully consider that item in fixing the amount of damages. The commissioners were practical men of high character. I am satisfied upon this evidence that the proposed highway was necessary, and the contestant awarded all the damages he was entitled to. The commissioners did substantial justice between the parties, and the amount involved is too small to warrant the expense of another trial. The decision of the commissioners should, therefore, be confirmed.

Ordered accordingly.

SMITH M. WEED et al., Plaintiffs, *v.* JAMES A. ROBERTS, as Comptroller of the State of New York, et al., Defendants.

(Supreme Court, Franklin Special Term, December, 1897.)

1. **Constitutionality of chapter 392, Laws 1897, relative to vacating a cancellation of tax sale.**

   Chapter 392 of the Laws of 1897, amending the Tax Law (Laws of 1896, chap. 908, art. 6, § 141), and authorizing the comptroller to set aside any cancellation of sale made by him or by any of his predecessors in office, is constitutional, as the office of comptroller is a continuing one, and the new incumbent merely takes up its business at the point where his predecessor left it.

2. **Same — Injunction denied — Remedy at law — Injury not irreparable.**

   A temporary injunction will not be granted, in an action brought to restrain the comptroller from granting an application presented to him to vacate a cancellation of sale, made by one of his predecessors in office, where the acts of the comptroller are not final, but may, if erroneous, be reviewed by a writ of certiorari, nor where the plaintiffs have an adequate remedy at law, nor where it does not appear affirmatively that positive injury to the plaintiffs will follow if the injunction is refused.

APPLICATION for injunction *pendente lite.*

Frank E. Smith, for plaintiffs.

T. E. Hancock, Attorney-General, for defendant Roberts.

Frank L. Bell (E. Countryman, of counsel), for defendant Davis and others, as commissioners, etc.

MCLAUGHLIN, J. There are many difficult questions of law involved in this proceeding, and to grant the injunction asked for by the plaintiffs would be in effect to decide these questions in their favor before the trial, and this a court of equity will not do unless it be first established that it is necessary in order to prevent an irreparable injury, or that the plaintiffs have an undoubted legal right to it. The papers presented do not establish either, and, therefore, the application must be denied. My reasons for reaching this conclusion are as follows:

First. It does not appear that the act of the comptroller, if he considers the application referred to, will be in any way prejudicial to the rights of the plaintiffs. The comptroller not only denies that he has determined or formed any intention to grant the application, but in addition he alleges that he has formed no opinion as to the merits of it. It is, therefore, fair to assume, if the plaintiffs' contention be correct, either as to the law or facts, that the comptroller will not grant the application.

Second. I do not think that chapter 392 of the Laws of 1897 is repugnant to the Constitution. The power conferred upon the comptroller to vacate or set aside the cancellation of a tax sale made by his predecessor in office, is a valid exercise of legislative power. If the legislature could confer upon the comptroller the power to cancel in the first instance, it necessarily follows that it could thereafter confer upon the same officer power to vacate or set aside a cancellation. In other words, it could authorize him to reconsider or rehear the matter once passed upon, and revise, reverse or confirm his former decision. The fact that the cancellation was made, not by the present comptroller, but by his predecessor in office, is immaterial. The office is a continuous one, and a new comptroller takes up the business pertaining to the office just where it was left by his predecessor, and carries it on in the same manner and with the same legal effect as if he had been the comptroller during the preceding term.

Third. If the comptroller entertains the application, and his decision thereon be adverse to these plaintiffs, they can review his action by writ of *certiorari*, and, if illegal, the same will be reversed. People ex rel. Forest Commission v. Campbell, 152 N. Y. 51.

Fourth. The plaintiffs have an adequate remedy at law. If the tax sale referred to is invalid, their title to the land in question is not affected; they may keep and defend their possession of it, or, if put out of possession, they may regain it by an action of ejectment. People ex rel. Millard v. Roberts, 151 N. Y. 543.

Finally, a court of equity will not entertain a suit to prevent a cloud upon title to land unless it be made to appear that there is a determination on the part of the defendants to create the cloud, and it is not sufficient that the danger is merely speculative; it must exist; it must be real. Clark v. Davenport, 95 N. Y. 483; Sanders v. Village of Yonkers, 63 id. 489. There is nothing which shows or tends to show that the act of the comptroller will be adverse to the plaintiffs. The proceeding to vacate and set aside the cancellation may never be perfected; it may be abandoned; the comptroller may refuse to vacate. The most that can be said is that the comptroller may act, and that his act *may* be adverse to the interests of the plaintiffs. Something more than this must be shown.

The application for injunction pending the action is denied, with $10 costs, to abide the event. The form of the order to be agreed upon, or, in default thereof, to be noticed for settlement before me (at least two days' notice to be given).

Ordered accordingly.

THE LONG ISLAND STATE HOSPITAL, Plaintiff, *v.* WILLIAM A. STUART, Defendant.

(Supreme Court, Kings Special Term, December, 1897.)

1. **Insanity Law — Complaint by a state hospital to recover against a father for the board of his child, not a minor.**

   A complaint in an action, brought in the name of a state hospital under the provisions of chapter 460 of the Laws of 1897, which merely alleges that a person, not stated to be a minor, was legally com-

mitted in 1893, to an asylum, which in 1895 was transferred to the state and became the hospital which brought the action, that the patient is without means, and that the defendant, who is his father, is the owner of valuable real estate and other property, and that at the rate fixed by the state commission in lunacy, for the care of the patient, an indebtedness has been contracted upon his part, and demanding judgment against the defendant for that amount, does not state a cause of action entitling the hospital to recover under any of the provisions of the Insanity Law (Laws of 1896, chap. 545).

2. Liability of a relative for the board of a patient.

Semble, that, before any relative can be legally charged with any liability for the board of a patient in a state institution, an order must be made establishing the remissness of the relative and directing the confinement of the patient at his charge and expense.

DEMURRER to complaint.

Frank A. Butler, for plaintiff.

Nathaniel H. Clement, for defendant.

HIRSCHBERG, J. This action is brought to recover the sum of $278.60, with interest from January 1, 1897. The complaint alleges:

I. The incorporation of the plaintiff as an institution for the care, treatment and maintenance of incompetent persons.

II. The legal commitment of William H. Stuart to the Flatbush Insane Asylum, June 3, 1893; the transfer of that asylum to the state October 1, 1895; its change of name at that time to its present name as plaintiff above entitled; and the continuance of said Stuart as an inmate from October 1, 1895, to June 1, 1897, a period of seventy-four and two-sevenths weeks.

III. That the said patient, William H. Stuart, is without means, has no committee, and is the defendant's son; and that the defendant is the owner of certain valuable real estate in the city of Brooklyn, and is otherwise a man of large means and of sufficient ability to properly care for and maintain his son.

IV. That the state commission in lunacy fixed the rate for the care, medical treatment and maintenance of the said patient from October 1, 1895, to June 1, 1897, at $3.75 per week, amounting to $278.60 in the aggregate; and,

V. That no part of said sum has been paid, although payment thereof has been frequently demanded.

The ground of demurrer is that the complaint does not state facts sufficient to constitute a cause of action; and the question presented is whether an action at law may be maintained under the provisions of the Insanity Law (Chap. 545, Laws of 1896), to recover from the father of an adult insane son committed prior to the passage of that act, the rate fixed for the latter's maintenance in the institution *as a liquidated debt.* If such an action will lie, it must be by force of some statute, and none is cited by the plaintiff's counsel expressly conferring such right of action.

It will be observed that the complaint contains no allegations to the effect that the patient is a minor; or that the defendant was in any way connected with or cognizant of the proceedings by virtue of which he was originally committed as an insane person; or that he knew of such commitment; or that he had refused or neglected to care for and support his son; or that his liability to support him in a public institution has been in any way fixed by judicial order. The nature of the proceedings resulting in his commitment is not disclosed. The complaint rests solely upon the allegations that the son has been *duly committed* as an insane person, and that the defendant, although of sufficient means, refuses to pay the board bill as fixed by the commission. If, therefore, the action can be maintained, it follows that the relative may be made liable without an opportunity to contest the question of the alleged insanity, and without any default in the discharge of the duty primarily resting upon him to care for and support his son outside of the asylum.

My attention has not been directed to any statute expressly conferring this right of action; but the plaintiff relies upon the general provisions of chapter 446 of the Laws of 1874, and its substitute, the Insanity Law, section 66, by which it is made the duty of a father to cause his insane son to be properly and suitably cared for and maintained, and upon the provision of chapter 460 of the Laws of 1897, to the effect that actions at law for the support of inmates of state hospitals shall be brought in the name of the hospital against any relative who may be liable therefor under the provisions of the Insanity Law. The law of 1874 was repealed by the later enactment. By the act of 1874 (§ 12,

tit. 1), it was made the duty of the father (among other relatives), if of sufficient ability, to provide a suitable place for the confinement of his lunatic son, and to confine and maintain him in such manner as shall be agreeable to the provisions of the act. If the father was not of sufficient ability to maintain him, then the authorities could order him to be sent to an asylum. By section 13 it was further provided that the overseers and superintendents of the poor should have the same remedies to compel the relatives to confine and maintain the lunatic, and *to collect the costs and charges of his confinement*, as are given by law in the case of poor and impotent persons becoming chargeable to any town. This provision involved a judicial investigation on notice, and the determination, by judicial order, of the facts of indigence and lunacy, of the pecuniary responsibility of the relative sought to be charged and of his failure to properly care for and support the afflicted individual. It will be seen that section 66 of the Insanity Law contains a provision substantially analogous. The duty to suitably care for and maintain the lunatic is re-enacted, and power is conferred upon the commissioners of charities and correction in Brooklyn to "inquire into the manner in which any such person is cared for and maintained." If in their judgment he is not properly or suitably cared for, they may apply to a judge of a court of record for an order to commit him to a state hospital, but such order shall not be made *unless the judge finds and certifies in the order* that such insane person is not properly or suitably cared for and maintained by such relative. Chapter 460 of the Laws of 1897 does not create any liability, but merely provides that the action to enforce a liability existing under the terms of the Insanity Law shall be brought in the name of the state hospital.

Section 68 of the Insanity Law relates to *dangerously* insane persons. The father is therein required to provide a suitable place for his lunatic son's confinement, and upon his refusal or neglect to do so, legal proceedings may be instituted, and a commitment ordered upon proper proof.

It seems to me that the scheme of the law is to require primarily that the support of the indigent insane shall devolve upon the relative; that only upon failure or refusal to discharge that duty is care assumed by the state; and that before any relative can be legally charged with liability for the board of the patient in the state institution, an order must be made establishing the remiss-

ness of such relative, and directing the confinement of the patient at his charge and expense. The provision of the law of 1874, conferring authority to collect the costs and charges of the confinement of the insane person does not appear to have been re-enacted. If the patient, however, has been committed under that act, it might well be held that his father would continue to be liable for his support, and at the asylum rates. But, as has been seen, there is no allegation in the complaint to the effect that the patient was committed under that act or under any other act making the father liable for his support. And as the present Insanity Law does not make the relative liable for the costs and charges of maintenance in the hospital, I can find no provision, and the plaintiff's brief suggests no provision, under which this action can be maintained.

My attention has been called to the case of Goodale v. Lawrence, 88 N. Y. 513. That was an action brought to recover for the support of an insane wife, and the verdict for the plaintiff was affirmed upon the common-law obligation of the husband to support his wife. The superintendent of the poor was permitted to recover in the same way and on the same ground that a private citizen would be permitted to recover who had furnished her the support which the husband had refused. The liability was not based on the obligation to support, but on the failure to fulfill it, and the refusal of the husband to support his wife was the essential allegation. The case would be more in point were William H. Stuart a minor. But the liability to support an *adult son* is statutory, and the statute creating it must furnish in express terms its measure and extent. If it be claimed that when the statute creates the general liability, the relation of the parties becomes the same as at common law, and that accordingly any one may recover for necessaries, the fact still remains that there must be proof of *neglect* on the part of the relative to supply the necessaries in order to justify a third person in supplying them at the expense of the delinquent.

The demurrer is sustained, and judgment directed for the defendant, with costs.

Demurrer sustained, and judgment for defendant, with costs.

ELIZABETH STAYNER, Plaintiff, *v.* THE EQUITABLE LIFE ASSURANCE SOCIETY OF THE UNITED STATES, Defendant.

(Supreme Court, Kings Special Term, December, 1897.)

Life insurance — Equity will not relieve from a legal forfeiture — Complaint and demurrer.

A complaint which alleges, in substance, that three annual premiums had been paid upon two several policies of life insurance; that thereafter there was a default; that the plaintiff thereupon became by the terms of the policies entitled to paid-up policies of a certain amount, provided the policies were surrendered, duly receipted, within six months of the date of the default; that they were not so surrendered because of the financial trouble and mental distress both of the insured and of the plaintiff, the assignee of the policies, and demanding as relief the issuance of paid-up policies, is demurrable, as equity will not relieve an insured person or his assignee from the consequences of a legal forfeiture.

DEMURRER to complaint.

H. H. Walker, for plaintiff.

Alexander & Green (Chas. B. Alexander and Chas. W. Pierson, of counsel), for defendant.

HIRSCHBERG, J. The complaint alleges two causes of action. The first one is to the effect that the defendant insured George H. Stayner in the sum of $75,000, on the 29th day of April, 1885, by a policy providing for annual payments of premium on July 28th; that three annual premiums have been paid on the policy, but that default was made in the payment of the premium which became due July 28, 1888, and no subsequent premium has been paid; that the policy contains a clause to the effect that "if premiums upon this policy, for not less than three complete years of assurance shall have been duly received by said society, and this policy should *thereafter become void* in consequence of default in payment of a subsequent premium, said society will issue, in lieu of such policy, a new paid-up policy, without participation in profits in favor of said George H. Stayner, his executors, administrators

or assigns, for the entire amount which the full reserve on this policy, according to the present legal standard of the state of New York, will then purchase as a single premium, calculated by the regular table for single premium policies, now published and in use by the society; provided, however, that this policy shall be surrendered duly receipted within six months of the date of default in payment of premium as mentioned above;" that the reason why the policy was not surrendered duly receipted within six months after the date of the default, was financial trouble and mental distress both of the insured and the plaintiff; that the policy has been assigned to the plaintiff; that at the time of the default, the reserve as a single premium would have purchased $6,300 of insurance; and that the plaintiff on the 6th day of July, 1897, duly demanded a paid-up policy for that amount, which was refused.

The second cause of action is similarly based upon a policy issued June 1, 1887, for $5,000, payable to plaintiff, on which default was made on April 28, 1893, and on which the reserve will buy $1,065 of insurance.

The relief demanded is the award of a paid-up policy for $7,365.

The demurrer is that the complaint does not state facts sufficient to constitute a cause of action.

The facts presented do not furnish a case justifying equitable relief. The law seems settled in this state that equity will not relieve the insured from the consequences of a legal forfeiture. Matter of Attorney-General v. Continental Life Ins. Co., 93 N. Y. 70; Holly v. Metropolitan Life Ins. Co., 105 id. 437; Fowler v. Metropolitan Life Ins. Co., 116 id. 389.

The plaintiff, however, asserts that she is relieved from the consequences of the delay by the provisions of section 92 of the Insurance Law (Chap. 690 of the Laws of 1892), requiring the company to mail a notice stating the amount of the premium, etc., prior to the day when the same is payable, and declaring that no forfeiture or lapse shall occur unless such notice shall be mailed nor until thirty days after the mailing thereof. No allegation is made that the required notice was not mailed within the time limited by the statute prior to the 28th day of July, 1888, and the 28th day of April, 1893, respectively, but her counsel argues that it must be assumed that no such notice was in fact mailed, and that the policy is still in force.

Waiving the apparent inconsistency of a claim that the policy is still in full force, with a concurrent claim that the plaintiff is entitled to a paid-up policy, which by the terms of a contract is only to be issued after the policy has become void, it seems to me that the failure to mail the notice is a fact essential to her cause of action. In her complaint she treats the policy as forfeited and assigns no date for the default other than the one when the first unpaid premium became due. She asks to be relieved from her neglect in not demanding the paid-up policy during the six months immediately succeeding that default, not by asserting that the six months had not commenced to run as a result of the defendant's failure to mail the statutory notice, but by the assertion of financial embarrassment and mental distress. Both by the terms of the policy and the provisions of section 88 of the Insurance Law, a paid-up policy may only be demanded within six months after default, and if the time has been extended by any act or omission of the company, that fact should be pleaded as one essential to the plaintiff's right to the relief sought.

The demurrer must be sustained, and judgment entered accordingly, with costs.

Ordered accordingly.

GEORGE R. BRISTOR, Plaintiff, *v.* GEORGE H. KRETZ et al., Defendants.

(Supreme Court, Kings Special Term, December, 1897.)

Stock Corporation Law — A stockholder is not personally liable to the attorney of a corporation.

An attorney-at-law employed, but not exclusively, by a corporation, at a salary of $50 per week, and not having his office in any building nor upon any property belonging to the corporation, cannot maintain an action, under the provisions of the Stock Corporation Law (Laws of 1892, chap. 688, § 54), making the stockholders of every stock corporation "personally liable for all debts due and owing to any of its laborers, servants or employees other than contractors, for services performed by them for such corporation," as he is neither a laborer, servant, nor employee, within the meaning of the statute, while the word "contractors," as used in the statute, refers merely to persons who perform work and furnish materials.

DEMURRER to complaint.

George R. Bristor (Wm. J. Groo, of counsel), for plaintiff.

Richard J. Morrison, for defendants.

HIRSCHBERG, J. This action is brought under the provisions of section 54 of the Stock Corporation Law (Chap. 688, Laws of 1892), making stockholders of every stock corporation "personally liable for all debts due and owing to any of its laborers, servants or employees other than contractors, for services performed by them for such corporation."

The plaintiff is an attorney-at-law, and the services performed by him were professional services rendered pursuant to a written agreement by which the corporation employed him, in the language of the complaint, "to do and perform such work as it might place in his hands as an attorney and counsellor-at-law, in connection with the business of the said company, and to pay him therefor a weekly salary of $50 per week, payable on each and every Saturday." The defendants are stockholders of the corporation; and the notice required to charge them was duly served, and a timely judgment was recovered against the corporation, execution issued and returned unsatisfied.

Is the plaintiff within the protection of the statute? Do the words "employees other than contractors," include an attorney-at-law, employed to perform professional services at a weekly stipend? Although the language of this act is broader and more comprehensive than that of other kindred acts which have received judicial construction, I am of the opinion that it is not sufficiently ample to embrace the case presented by the plaintiff. Statutes imposing upon stockholders a personal liability for the corporate debts have always been strictly construed in this state; and such construction has always been in conformity with the intent of the statutes without extending the liability beyond their literal terms.

The object of the statute is to furnish to the servants, laborers and all other like employees of corporations, in terms broad enough to cover every employee of the corporation as such, greater security for the payment of their stipulated salaries and agreed compensation than the credit of the corporation alone would furnish. The words, "laborers, servants and employees," are used in their cognate

sense, and the services to be performed must be assumed to be services performed in the business of the corporation, and which by its incorporation it was authorized to carry on. The classes protected are such as experience shows peculiarly require protection in the collection of wages and salaries which are generally the sole means of subsistence for the individuals comprising such classes and their families. There is no evidence to be gathered from the language of the act of a legislative intent to go beyond the distinctive work and business of the corporation, and thereby protect attorneys-at-law in the practice of their profession from loss by reason of the insolvency of clients. The relation of the parties is not that primarily of master and servant, but that of attorney and client. In fulfilling the obligations of that relation, the attorney does not act as an employee engaged in the business which the corporation is organized to carry on, but as an officer of the court engaged in the practice of an independent profession; and the debt arises from the work of that profession, and not from services rendered in the direct discharge of the corporate operations. He is secured not only by greater freedom in contracting for favorable terms of payment than the general servants, laborers and employees of corporations usually enjoy, but he has a lien for his services on his client's papers, and in case of litigation upon his client's cause of action or counterclaim. No rule of statutory construction would extend the provision in question to the case of an attorney employed in an isolated and special proceeding in behalf of the corporation, and as the nature and scope of the employment is in its essence beyond the contemplation of the provision, the liability of the stockholders cannot be extended by an agreement made without their knowledge or consent having the effect of placing the attorney upon the weekly pay-roll. The construction here given is not affected by the words "other than contractors." The contractors referred to are contractors in the performing of work and furnishing materials essential to the creation of a plant suitable for, and the carrying on of the operations incident to, the corporate business and affairs. If the word "contractors" is to be taken in its broadest and most comprehensive sense, then it would seem that an attorney who makes a general contract or engagement to transact all the law business of the corporation for a year at a fixed price is himself a contractor. It seems to me, however, more reasonable to regard the entire ex-

pression in its natural, usual and restricted meaning, thereby embracing within its protection only those whose occupation and employment are in the immediate service of the corporation as the result of a hiring, and excluding those engaged in the business of contractors or in any other business alien to that of the corporation and who are incidentally employed to conduct such business independently of the corporation, although for its benefit.

In construing a statute, effect is given if possible to every word and expression used. It is assumed that the words "laborers" and "servants" are used by the lawmaker advisedly, and are not surplusage. "Laborers" are those who toil in a menial capacity; "servants" are those who serve manually, yet include a class above the mere laborer; and "employees" embraces every other grade of similar service with brain and hand. If, however, the plaintiff's contention is correct, and the word "employees" is to be regarded as the correlative of "employers," the words "laborers" and "servants" would be meaningless. In that sense these words would be included in the word "employees," and the statute would be construed as if it read "all debts due and owing to any of its employees other than contractors." The association and collocation of the words actually used would thus be ignored, and a different law substituted for the one passed by the legislature.

In People v. Remington, 45 Hun, 329, it was held that under a statute giving a preference to employees, operatives and laborers of a corporation, an attorney employed to render professional services for the corporation was not an employee within the meaning of the statute. This case was affirmed by the Court of Appeals (109 N. Y. 631), on the opinion of the General Term, and its authority remains unquestioned.

The case of Gurney v. Atlantic G. W. Railway Co., 58 N. Y. 358, is not in conflict with the views herein expressed. In that case the question decided was whether the language of an order appointing a receiver and directing him to pay debts owing to the laborers and employees of the corporation, was intended to include a claim for professional services. Evidence was given that the order was the result of negotiation and compromise, and that the word "employees" was used by the parties drafting the order with a distinct view of embracing the claim for professional services of the company's attorney. The court distinguished the case from those creating a statutory liability. There is, said Chief Judge

Church, referring to the latter cases, page 367, "a distinction between the above cases and this, in the rules of construction, which should be applied. In those cases there was a statute liability created against stockholders, and such statutes are always strictly construed. Again, the courts held that it was the policy of the legislature to protect those only who are the least able to protect themselves and who earn their living by manual labor for a small compensation, *and not by professional services*, and this supposed legislative policy exerted a controlling influence upon the courts. In this case it was entirely different. There was no question of policy. It was a scramble for payment of debts against a defaulting corporation, and the terms of the order were fixed by negotiation and agreement between interested parties."

I am not considering the case which would be presented if the plaintiff were exclusively employed in the service of the corporation. There is no claim here that the corporation contracted for all the time of the plaintiff to the exclusion of other clients. The plaintiff's office is not in any building or on the property of the corporation, nor were his services rendered within the corporate domain. The case is one of engagement for special services, differing from the ordinary employment of a lawyer only in that a definite period of time is fixed, and the compensation is reduced to a weekly allowance.

The demurrer should be sustained, with costs.

Demurrer sustained, with costs.

HERSEY BROWN and CHARLES A. LENT, Plaintiffs, *v.* CHARLES M. DENNISON, Defendant.

(Supreme Court, Kings Special Term, December, 1897.)

Partnership — Option to buy out other partners — Effect of failure of purchasing partner to perform — Rescission — Counterclaim.

Where the terms of a partnership agreement give one partner the option, at the close of the partnership, to buy out the interests of the others, and he, after an adjustment had, fails to pay them the sums found to be due them, they are entitled to rescind the agreement of optional purchase, and may subsequently maintain, against him, the ordinary action for an accounting, and for the appointment of a re-

ceiver of the firm assets; nor can he, upon the theory that the title to the firm property has passed, and that he was liable merely for the balance of the purchase price, successfully interpose a counterclaim which alleges, in substance, that the other partners had for some months prior to the close of the partnership, impaired the value of the business and its good will by undermining it to the advantage of rival firms, as he, by neglecting to pay the other partners for their shares, entirely failed ever to gain any title to the firm property.

ACTION for an accounting and for the appointment of a receiver.

J. Orlando Harrison, for plaintiffs.

Atwater & Cruikshank, for defendant.

HIRSCHBERG, J. The parties were copartners until January 31, 1897, under the firm name of Dennison & Brown. Their partnership agreement provided that at the close of the copartnership, the defendant should *take immediate possession* of all of the assets, and should wind up the business and settle the affairs of the copartnership, as provided for in articles 13 and 14 of said agreement. Article 13 related to the manner in which the affairs of the firm should be wound up in case the defendant availed himself of the privilege of purchasing his partner's interests as conferred by article 11. This is in effect provided that if the defendant desired to purchase such interests he should notify his partners of such intention ten days before the termination of the copartnership; that he should pay to the plaintiff Brown the sum shown by the books to be due him, together with $1,200 for his good will in the business, and to the plaintiff Lent the sum shown by the books to be due him, together with $1 for his good will in the business; and that on the receipt of the moneys above specified, or a tender thereof, the plaintiffs should give to the defendant a bill of sale of their entire respective interests and good will in the partnership and business. Article 13 provided that if the defendant decided to avail himself of the option or privilege so conferred by article 11, he should pay to the plaintiffs the amount which should be due them within sixty days after taking possession of the property. Article 14 provided in case the said defendant should not take advantage of the option or privilege

granted, that then the debts of the firm should be paid, the assets converted into cash as soon as practicable, without serious sacrifice, and the net property of the firm distributed among the parties according to their rights and interests as fixed by the agreement.

On the 21st of January, 1897, the defendant gave the plaintiffs due notice that he availed himself of the option to purchase, and on the 31st of January, he took possession of the firm property. The parties thereupon adjusted, and agreed upon, the sums due the plaintiffs, respectively, as follows: There was found to be due the plaintiff Brown the sum of $13,554.02, and to be due to the firm from the plaintiff Lent the sum of $821.11. The plaintiff Brown, however, agreed that Lent's indebtedness should be charged against the amount due to him, thereby reducing the sum to $12,732.91, and making, with the $1,200 for the good will, the sum of $13,932.91 as the purchase price of the property and good will required to be paid by the defendant under the terms of the option. The defendant never paid any part of this sum. On the 1st day of February, 1897, he transferred all the property of the firm to a new copartnership formed by him and his sons under the firm name of Dennison & Sons, and when at the expiration of the sixty days, the plaintiffs tendered him the bill of sale and demanded payment of the money, he refused to pay the agreed price or any part of it. The plaintiffs thereupon notified the defendant that they rescinded the agreement to sell at the price stated, and would enforce their legal rights as partners in the firm. This action is accordingly brought for an accounting and the appointment of a receiver.

The defendant, in his answer, substantially admits all the allegations herein recited, but sets up a counterclaim or offset in the sum of $20,000, and asks judgment for a balance of $6,000. The counterclaim or offset is based on the assertion that the plaintiffs for months prior to the close of their copartnership term were unlawfully undermining its business, procuring patronage in its line for rival concerns, and especially for a firm of which they had then agreed to become members, violating the terms of the copartnership agreement by not devoting their whole time and best endeavors to the firm's interests, and thereby and in other kindred ways, impairing the value of the good will of the business to the defendant's damage in the sum named.

On the trial, the plaintiffs moved for an interlocutory judgment upon the pleadings, and it was conceded that the facts as stated

in the pleadings furnished all the information in the possession of the parties and essential to the ultimate decision of the case.

The plaintiffs are entitled to the relief sought. The claim of the defendant is that the sale to him was consummated; that the title to the property passed to him, leaving him liable for the purchase price to be recovered in an action at law, in which his counterclaim may be interposed and litigated. Undoubtedly the defendant had under the copartnership agreement the right to the possession of the property, together with the right of selling and disposing of it; but, as against his partners, the only way he could become the sole owner was by buying and paying for it. The contract contemplated payment in cash, and he cannot, therefore, pay for the property by merely complaining that he has agreed to give more for it than it is worth. The contract was executory. The plaintiffs agreed to sell and to execute and deliver a bill of sale upon receiving payment. The defendant being lawfully in possession, agreed to buy and pay in cash. When the time arrived for the payment and the delivery of the bill of sale, the defendant refused to carry out the agreement, and the plaintiffs have elected to treat it as abrogated. Title could not be taken by an election to purchase without performance or its equivalent in readiness and offer to perform. Hull v. Cartledge, 18 App. Div. 61; In re Wright, L. R., 10 Ch. Div. 554.

It is alleged in the answer that the transfer to Dennison & Sons was made with the plaintiffs' knowledge and assent, but I do not see that that fact affects the situation. It occurred within ten days of the time when the defendant took possession, and consequently fifty days before the time when payment by him was compellable. The defendant claims that the provision for the bill of sale was waived by such knowledge and assent. Had the transfer taken place after the expiration of the sixty days, there might be some force in this contention, but, under the circumstances, I see no justification for the assertion that the plaintiffs waived any of their rights under the partnership agreement. The defendant must account for the value of the copartnership property and good will which he has sold, and an interlocutory judgment will be granted, appointing a receiver and a referee.

Ordered accordingly.

WILLIAM H. RILEY, Plaintiff, *v.* ANNA WALLER, as Executrix, etc., Defendant.

(Supreme Court, Kings Trial Term, December, 1897.)

Funeral expenses are a charge against the estate of a decedent — Form of action.

The necessary and suitable expenses and services, attendant upon the burial of a decedent, ordered by his widow, are, in the absence of proof that they were incurred and rendered upon her own credit, a charge against the estate of the decedent alone; and an action for their recovery is properly brought against the executrix in her representative capacity.

MOTION for a new trial, upon the minutes, after verdict directed for the plaintiff.

M. F. McGoldrick, for plaintiff.

W. J. Courtney, for defendant.

GAYNOR, J. This action is against the executor as such for the value of work done and material furnished by the plaintiff in the actual burial of the testator. They were necessary to the burial and suitable in expense to the estate. They were done and furnished at the request of the widow, but not upon her credit, or upon any contract, but upon the credit of the estate. The evidence of the defendant to show that she never ordered the work and material was excluded as irrelevant, the case being thus rested upon the proposition of law that nevertheless the estate is liable therefor, and the action was properly brought against the estate, viz., against the defendant as executor.

It is contended that the action cannot be maintained against the executor in her representative capacity, but only against her individually. As the claim is a valid charge against the estate, and must be got out of the estate in some way, the objection seems frivolous, notwithstanding the amount of apparent authority which may be cited for it. But such authority is more seeming than real. The executor is not individually liable for the claim. Upon what intelligent principle or reason, then, should the action be

brought against her individually? If the debt were hers, and not against the estate, the action would of course have to be against her. But it is not hers; she did not create it; it is against the estate, having been created against it by operation of law.

For obligations incurred by an executor or administrator in the course of administration, actions do not lie against him in his representative capacity, but only against him individually. He is liable upon them individually without any regard to whether he can get reimbursement from the estate upon his accounting. The persons with whom he so deals have nothing to do with that. They acquire through him no claims or rights of action against the estate, and he has no power to give them any (Austin v. Munro, 47 N. Y. 360). Actions may be maintained against him in his representative capacity only upon rights of action against the estate; and these can only be such as existed against the decedent in his lifetime, or mature out of his contracts or his will, or arise by operation of law, after his death.

By the common law the suitable expense of the burial of a deceased person was a valid claim and first charge against his estate directly, and not indirectly, or by any fiction of intermediate liability by the executor or administrator individually; and this is still the law. Whoever, relative or stranger, does the service of burial, or has it done, provided he be not a meddler, or has not done it upon a special contract with some one to pay for the same, has a legal claim therefor, not against the solvent or insolvent individual who may qualify as executor or administrator, but against the estate. The many authorities for the foregoing tempt the overgrown habit of citation; but let one reference suffice (Patterson v. Patterson, 59 N. Y. 583).

To review the many disagreeing and abstruse decisions upon this vexed question, of whether an action upon a claim for necessary funeral expenses, which is a charge against the estate itself, should be brought against the executor or administrator individually, instead of in his representative capacity, would seem to be a vain and useless thing. The smaller the point, the greater the dispute, is an adage. The rule that for obligations incurred by the executor or administrator during administration, recourse may only be had against him individually, and not against the estate, is generally recognized in them; but it seems to be not always perceived that the obligation arising by operation of law against the estate itself in favor of those who perform the duty of burial, does not come

within that category. It is created by the law, not by the executor or administrator; and it is with this in mind that our statute expressly recognizes the expense of burial as a direct charge against the estate, and permits an executor to pay it out of the same even before he qualifies (Code Civ. Pro., § 2613); and also classes it with the debts of the decedent in making provision for their payment out of the realty (Id., § 2749). The invariable practice also is to make out and present against the estate claims for the funeral expenses. No layman would think of making claim therefor against the executor or administrator individually, unless he had made himself individually responsible. In many of the cases the plaintiff had entered into a special contract with the executor or administrator, sometimes for a fixed amount, instead of doing the service upon the credit of the estate; thus affording ground for the decision that he must bring action against the executor or administrator individually. Such upon its precise facts was the case of Ferrin v. Myrick (41 N. Y. 315). The decision there is upon the principle that the plaintiff had no claim against the estate, for the reason that he did not do the work upon the credit of the estate, but upon a special contract with the administrator individually, though the prevailing opinion may not clearly bring that out; but we have received a very recent admonition from the court of last resort that statements in the opinions of its members by way of discussion are not to be taken for law, but only the precise decision made upon the facts of the case (Colonial T. Co. v. Kingston R. Co., 154 N. Y. 493). If such an admonition had come earlier, much obedient following and consequent going astray would have been avoided (Hickey v. Taffe, 32 Hun, 9; 99 N. Y. 209).

The later case of Patterson v. Patterson (*supra*) seems to be precisely in point. There the executor brought action upon a bond executed by the defendant to the testator. It came into his hands as part of the estate, and an inspection of the complaint shows that he brought the action (as was proper) in his representative capacity. The defendant set up as a counterclaim the necessary funeral expenses paid by him, and its disallowance below was reversed. It follows that he had a cause of action against the estate, viz., against the executor in his representative capacity therefor. There are other cases in which the precise question was so decided (Laird v. Arnold, 25 Hun, 4; Matter of Laird v.

Arnold, 42 id. 136; Adams v. Butts, 16 Pick. 343; Redf. L. & Pr. 5th ed., p. 438).

The decisions (like Benedict v. Ferguson, 15 App. Div. 96) which uphold actions for funeral expenses against an executor or administrator individually, upon a complaint that he has funds of the estate sufficient to pay the same, but refuses, are not adverse to this action. They hold (the later ones only following precedents) that that kind of an action may be, not that this kind may not be, maintained. Indeed, the rule governing such actions, that the executor or administrator may not be made personally liable unless it be pleaded and proved that he has sufficient funds of the estate, goes to show that he is not in any sense whatever individually liable for the claim, but that the estate alone is. The motion for a new trial is denied.

Motion denied.

ENGELBERT HARDT et al., Plaintiffs, *v.* SIMON L. DEUTSCH et al., Defendants.

(Supreme Court, New York Special Term, December, 1897.)

1. **Fraudulent conveyance — Chattel mortgage.**

A chattel mortgage with an attendant agreement, whether in the instrument or not, whether written or oral, and whether express or tacit, that the mortgagor may remain in possession, with a power to sell in the usual course of trade, but without an obligation to apply the proceeds in payment of the mortgage, is, as matter of law, fraudulent and void against creditors of the mortgagor.

2. **Same.**

Where, however, it appeared that shortly after, and on the same day on which chattel mortgages were executed and delivered, before knowledge of their existence could have transpired, while yet none of the property had been disposed of by the mortgagors, and no lien acquired or action brought by any creditor, a collateral agreement, or tacit understanding that the mortgagors should remain in possession of the mortgaged property and sell the same in the ordinary course of trade was annulled, and possession of the property surrendered by the mortgagors to the mortgagees, Held, that the mortgages were valid; that they were not, in legal effect, bills of sale and so transfers by insolvent debtors for an inadequate consideration; that a transfer by the mort-

gagors of the surplus of the mortgaged property and proceeds did not authorize a presumption of a secret trust to the use of the mortgagors; and that such mortgages did not constitute, or form part of, a fraudulent device to coerce creditors to a compromise.

CREDITOR'S action to subject mortgaged chattels to the satisfaction of plaintiffs' judgments.

Blumenstiel & Hirsch, for plaintiffs.

Horwitz & Hershfield and Joseph Fettretch and Henry Gottgetreu, for defendant mortgagees.

PRYOR, J. The action is a creditor's suit to subject mortgaged chattels to the satisfaction of plaintiffs' judgments.

The mortgages in controversy, payable on demand, and covering all the merchandise in the mortgagors' store, were executed on the 16th of May, 1896, by the firm of Deutsch & Co.; one to Wallach & Schiele, as security for $42,514.06, of which $17,514.06 was an antecedent debt, and $25,000 was advanced at the time; the other to Nathan Silverstein for $17,400, of which $12,400 was an antecedent debt, and $5,000 an advance at the time. The consideration of the mortgages goes without challenge; and no question is made of their apparent validity. That within five hours at farthest after execution, the mortgages were duly filed, and the mortgagees assumed actual, open and exclusive possession of the mortgaged property, which they retained until by the sale of goods their debts were discharged, when they turned over the surplus to other creditors of the mortgagors, are also uncontroverted facts upon the record.

Nevertheless, plaintiffs impeach the validity of the instruments; principally upon the ground of the illegality of an agreement between the parties at the time of execution.

A mortgage of merchandise, with an attendant agreement, whether in the instrument or not, whether written or oral, and whether express or tacit, that the mortgagor may remain in possession, with a power to sell in the usual course of trade, but without an obligation to apply the proceeds in payment of the mortgage, is, as matter of law, fraudulent and void against creditors of

the mortgagor. Mandeville v. Avery, 124 N. Y. 376; Hangen v. Hachemeister, 114 id. 566; Potts v. Hart, 99 id. 168; Southard v. Benner, 72 id. 424; Randall v. Carman, 89 Hun, 84; Cook v. Bennett, 60 id. 8; Sperry v. Baldwin, 46 id. 120, 124; Yates v. Olmsted, 65 Barb. 43, 47. Such an agreement, operating such an effect, plaintiffs impute to the parties to the mortgages in question; and upon the evidence it is impossible to resist the force of the contention.

The sole survivor of the mortgagor firm, called by the plaintiffs, testified as follows: "Q. What did you want this money for?"—meaning the cash loaned. "A. That is as I have stated. Q. To pay debts? A. No; to carry on the business. Q. In what way to carry on the business? A. Not any different than before. Q. Did Mr. Wallach and Mr. Silverstein hear that you were to carry on the business; were they present? A. Yes; I presume so." Again: "Q. What was said as to what particular debts this money was to be used for? A. I did not know that it was used" (manifestly *to be* used) "for debts; I supposed it was to continue our business."

Mr. Wallach, the mortgagee, testified: "Mr. Simon L. Deutsch came to me and told me he needed $25,000 to $30,000 to carry the business over until the following fall. * * * " "Q. Was it intended when you took the mortgages that they should go on in business? A. It was. Q. And with the same property? A. Yes, with the same property that was there." Again: "By the Court: I understood you that before you took possession of the property, the time that the mortgage was executed to you, the understanding between you and Mr. Silverstein on the one side and Deutsch & Co. on the other, was that Deutsch & Co. were to carry on the business as they had been carrying it on before? A. Yes, sir. Q. Was anything said or understood about their accounting for the proceeds at that time? A. They promised to pay us in the fall, when the receipts would be much larger than in the summer. Q. In the meanwhile, what was the understanding about the payment for the rent of the building and the services — who was to pay for that? A. At that time I had no idea of foreclosing, and they were going on in the regular way. Q. They had to pay the rent? A. Yes. Q. And pay the employees? A. Certainly. Q. And out of the net profits they were to satisfy these mortgages? A. They were to pay us; they always did keep on paying us on account. Q. They had paid you along as they had money, and you kept a gen-

eral account, giving them credit? A. Yes, sir. Q. Before any payment was to be made to you, they were to discharge that account, expenses, rent, etc.? A. I suppose that was understood; there was nothing said about that."

That the arrangement thus avowed by the parties suffices to invalidate the mortgages, is a proposition altogether beyond controversy. Randall v. Carman, 89 Hun, 84, 87, and citations, *supra.*

It is suggested that the witnesses did not apprehend the import of the questions, and responded blindly; but I was impressed as well by their intelligence as their candor, and I entertain no doubt that their answers corresponded with their intention.

It is insisted, however, that the witnesses subsequently, on examination by their counsel, so retracted and qualified their testimony in chief that, upon the whole, the evidence fails to establish the imputed agreement. I do not so understand. As I prefer to view their explanation, they meant only to repudiate any express agreement, and not to deny any or all tacit understanding. If otherwise, however, I cannot hesitate to accept a story spontaneously and frankly delivered, before the witnesses were advised as to the effect of their admissions, in preference to a recantation, drawn out by the skill of counsel, after they had been admonished of the mischief wrought by their testimony. Indeed, in recalling or qualifying his former statement, Mr. Wallach let slip an expression quite inconsistent with his innocent explanation. Asked by his counsel, "What prompted you to take that step?" *i. e.*, demand possession of the mortgaged property, he answered, "it occurred to me if I let Deutsch & Co. go on and sell, that they might divert the money to other purposes than the one which it was intended for, to pay us." Here, by implication, is an admission that he had consented that Deutsch & Co. might sell.

It is true that these witnesses were called by the plaintiffs; but they are defendants charged with the fraud; and the court is at liberty to attach more weight to their accusing confessions than to their exculpatory retraction. Becker v. Koch, 104 N. Y. 394; Newman v. Clapp, 20 Misc. Rep. 67; 44 N. Y. Supp. 439.

Did the case rest here, there would be no escape from the conclusion that the mortgages were avoided by the agreement for the possession and beneficial use of the property by the mortgagors.

Though a mortgage be void, yet if before any lien in favor of creditors, the mortgagor, by an independent act, transfers the property to the mortgagee in payment of the debt, he acquires an in-

defeasible title. Bowdish v. Page, 153 N. Y. 104, 109, and cases cited; Karst v. Gane, 136 id. 316, 324; Stephens v. Perrine, 143 id. 481.

In Tremaine v. Mortimer, 128 N. Y. 1, 9, the court said that in case a mortgage be void, the mortgagee, before intervention of an adverse interest, may take a new mortgage.

"The law affords a person an opportunity to withdraw from an illegal contract before it has been executed," *i. e.*, carried out. Anderson's Law Dict. "*Locus Poenitentiae*," page 637.

By uncontradicted evidence these facts are established: That within a few minutes of receiving the mortgages it occurred to defendant Wallach that they were a precarious security, so long as the property was left in the possession and disposal of the mortgagors; that after advising with his partners he immediately consulted his lawyer, by whom he was instructed that the possession of the property was indispensable to the security; that thereupon he sent for the other mortgagee and the mortgagor, Simon L. Deutsch; that upon their arrival the mortgagees made demand for payment of their debts; that the mortgagor declaring his inability to pay, he was at once notified that the mortgagees would take possession of the property; that no objection was alleged by the mortgagor, who went with Wallach to the store, introduced him to the bookkeeper, and told the bookkeeper that Wallach had charge of the place. Immediately the mortgagors "stepped out."

Thus, within five hours from the execution of the mortgages; before knowledge of their existence could have transpired; while yet none of the property had been disposed of by the mortgagors, and no lien acquired nor action brought by any creditor, the obnoxious agreement was annulled, and possession of the property surrendered by the mortgagors.

Upon the proof the position is untenable that the mortgagees got possession of the property otherwise than under and by virtue of the mortgages. But why were not the mortgages valid? They were never infected with any inherent vice, their only infirmity being that they were connected with a collateral agreement which imparted to them its own illegality. This agreement canceled and possession taken, why are not the mortgages exempt from the vicious contagion?

The evil effects which provoke the condemnation of a mortgage allowing the possession and use of the property to the mortgagor are, that it affords no real security to the mortgagee; is of benefit

only to the mortgagor, and lulls the vigilance of existing and invites the confidence of future creditors by a false appearance of undiminished assets. Stimson v. Wrigley, 86 N. Y. 336; Pierce on Fraudulent Mortgages of Merchandise, § 122. None of these mischiefs ensued or could have ensued in the present case. By the prompt possession of the mortgagees the security was made effectual, and all benefit to the mortgagors intercepted; and no ownership by them appeared to impose upon the public. All the safeguards which the law provides for the protection of creditors against fraudulent transfers, were, in fact, present and operative, in assurance of the good faith and legality of these mortgages — adequate consideration, innocent intent, immediate possession and timely filing.

Indisputably, upon the abandonment of the unlawful agreement, new mortgages would have been valid (Tremaine v. Mortimer, *supra*); but the substitution of mortgages identical in terms would have been an idle and useless formality; for, in the brief interval between the agreement and its withdrawal, no adverse interest was interposed — no lien acquired and no confidence reposed.

While thus, on the one hand, no injury has befallen the plaintiffs from the transitory existence of the canceled agreement, on the other, great and irreparable loss would result to the defendants from the sacrifice of their securities. Sixty thousand dollars of their money has gone to augment the assets of the mortgagors available to creditors, and only by enforcing the securities may this sum be reclaimed. The equity of the case is altogether with the defendants.

Even usury is purged by the substitution of a contract free from the original taint (27 Am. & Eng. Ency. of Law, 964), and I cannot but conclude that, in this case, the abrogation of the vicious agreement before actual or possible harm, and while, in fact, the transaction was still conducting, leaves the mortgages unblemished and invulnerable.

Plaintiffs challenge the mortgages again as being, in legal effect, bills of sale, and so a transfer by an insolvent debtor for an inadequate consideration.

Obviously, this position is in negation of the previous contention, for a conditional and an absolute transfer are not predicable of one and the same transaction. Waiving the contradiction, the substan-

tial answer to the proposition is, that as well in fact as in form, the instruments were chattel mortgages. As such they were delivered and accepted; as such they were foreclosed and the surplus turned over. A chattel mortgage, payable on demand, is a familiar security; and I know of no principle or precedent by which it is transmuted into an absolute sale. Moreover, inadequacy of consideration is not proof of fraud — certainly not when the disparity between price and value is no greater than in the present case. Jaeger v. Kelley, 52 N. Y. 274.

Plaintiffs insist further, that the transfer by the mortgagors of the surplus of the mortgaged property and proceeds authorizes a presumption of a secret trust to the use of the mortgagors, contrary to an express provision of statute. But such an inference would be a palpable *non sequitur*. "The mortgagor has the right to redeem before sale, or to receive the surplus, if any, that shall arise upon a sale. He has an interest in the property which is assignable, and such interest under a general assignment for the benefit of creditors passes to the assignee." Kitchen v. Lowery, 127 N. Y. 53, 59; Tremaine v. Mortimer, 128 id. 1, 11. Accordingly, these mortgagors executed assignments of the surplus to various creditors; and such surplus was paid by the mortgagees in conformity with law and the right of the claimants. That the mortgagees were privy to these assignments, or that the assignees were not *bona fide* creditors, is sustained by no particle of proof. Indeed, the assignments were some time subsequent to the execution of the mortgages, and to the possession of the property by the mortgagees. "When it was delivered the title to the property passed under it, and if, at that time, it represented an honest purpose and was made in good faith, fraud could not be fastened upon it afterward by any acts or statements of the assignors." Roberts v. Buckley, 145 N. Y. 215, 224.

Delaney v. Valentine, 30 N. Y. Supp. 512, 517, is distinguishable from this case in the essential circumstance that here no trust "was created by the mortgagor in the mortgage, for the benefit of other creditors not named as mortgagors."

Since the effect of these mortgages was the utter ruin of the mortgagors, I am unable to discover any benefit they themselves derived from the transaction.

Finally, plaintiffs urge that the mortgages were but a device to coerce creditors to a compromise; but where is the evidence of the

fact"? Fraud cannot be presumed. It must be proven, and if there is left room for the inference of an honest intent, the proof of fraud is wanting." Bernheimer v. Rindskopf, 116 N. Y. 428, 436. "When the instrument and the acts of the parties are fairly capable of a construction consistent with innocence and the general rules of law, they should be given that construction in preference to one which would impute a fraudulent intent or defeat the general intent and purpose of the conveyance." Roberts v. Buckley, 145 N. Y. 215, 224. In support of their theory the ingenious counsel for the plaintiffs adduce nothing but arbitrary presumption and specious speculation. But, "the creditor must prove tangible and substantial facts from which a legitimate inference of fraudulent intent can be drawn." Wait's Fraud. Conv., § 5.

Upon a critical survey of the case, I observe no proof of fraudulent intent on the part of the defendants; and since the legal presumption of fraud was effectually effaced by the rescission of the illicit agreement, the mortgages must stand.

Judgment for defendants dismissing the complaint on the merits, with costs.

Ordered accordingly.

EMILY MIXSELL, as Administratrix, Plaintiff, *v.* THE NEW YORK, NEW HAVEN & HARTFORD RAILROAD CO., Defendant.

(Supreme Court, New York Trial Term, December, 1897.)

1. Negligence — Duty of one crossing a railroad — Looking but once — Presence of smoke.

Proof that a person, intending to take an accommodation train, which ran upon that one of four tracks which was farthest from him, attempted to cross the tracks at a point beyond the station where crossing was permitted, but where there was neither planking nor flagman; that he looked in both directions only at a point a few feet from the first track, and when the point of crossing was obscured by the smoke of the accommodation train which was passing on the fourth track; that he then knew that an express train, moving at the rate of thirty-five miles an hour in the same direction as the accommodation train, not stopping at the station, and which ordinarily could have been seen by him at a distance of about a mile, would be due within a minute upon the third track, and that he went forward

and was killed by the express train on that track, which was distant only thirty-four feet from the point where he looked in both directions, indicates that the deceased was guilty of contributory negligence as matter of law.

2. **Practice on setting aside a general verdict, directed upon a special verdict — Dismissal of complaint.**

Where a general verdict, directed to be entered upon a special verdict rendered under the provisions of section 1187 of the Code of Civil Procedure, as amended in 1895, and covering both issues of fact and the amount of damages, is set aside by the trial judge, together with the special verdict, he has power, although he has already once denied a motion made to dismiss the complaint, to reconsider that motion and, upon concluding that in no view of the evidence and findings can the plaintiff recover, may dismiss the complaint, with costs, as the plaintiff is shown not to be entitled to a new trial of the action.

MOTION to set aside a verdict and for a new trial.

Charles Strauss, for plaintiff.

Henry W. Taft, for defendant.

RUSSELL, J. The plaintiff recovered by verdict of a jury $30,000 for the negligent killing of her deceased husband, Dr. Mixsell. The motion to set aside the verdict, dismiss the complaint or award a new trial, brings up interesting questions under the present practice as to the effect of special findings by a jury in a common-law case, considered in connection with the evidence as applied to the contributory negligence of the deceased. Those special findings were taken under the amendment of 1895, allowing the court to submit to the jury such questions of fact and the assessment of damages pending a motion to dismiss the complaint or to direct a verdict. Code Civ. Pro., § 1187.

The accident occurred at the town of Mamaroneck, near New York city, on the tracks of the defendant, and was caused by an express train coming to New York, running at the rate of thirty-five to forty miles an hour. It was the last day in October, 1896, and was neither bright nor unusually cloudy. Dr. Mixsell was hurrying to catch the accommodation train for New York, scheduled to leave at 10:31 a. m., about which time the express train, running in the same direction, was accustomed to pass without stopping. The accommodation ran on the fourth or northerly track, and the ex-

press on the third, being the one next to the track for the accommodation train. The main station was on the northerly side with only a waiting room on the other side. One street from the village to the station passed under the tracks about a third of a mile from the station, but passengers desiring to take the trains on the northerly tracks were accustomed, when it was more convenient to do so, to approach the railroad tracks by a path by the side of the street from the end of the walk up to the railroad tracks, and there cross the four tracks, although there was no planking for that purpose, and the track beds were raised and filled to the height of eight or ten inches by crushed stone or gravel. This method of crossing had been permitted by the railroad company without objection.

Dr. Mixsell had been a prominent physician at Mamaroneck for many years and was well acquainted with the situation of the tracks, and the arrival and departure of the trains, the schedule of the express and accommodation trains being the same as it had been for a long time. Evidently intending to go to New York he stopped on his way to the station to see a patient, and arrived at the platform very near the time when the accommodation train pulled in. He passed westerly outside of the track and the railroad fences, which for some 600 feet prevented a direct crossing from the waiting-room to the station to the place where he could clear the fences, and where frequently passengers had been accustomed to cross the tracks. One witness saw him stop some six or seven feet from the first track, turn his face in each direction, and then proceed to cross the tracks. He was struck by the express train on the third track and killed. There was no obstruction whatever to his sight of this express train, unless it was hidden from view by the smoke or vapor of the accommodation train on the north track pulling in ahead of the express. There was a straight view of about a mile to the east, so that if the express was seen by the deceased at such a distance he had ample time to cross the tracks and get to the station, and, but for the vapor, if the express train were closer by, easy power of sight to judge of the distance, and refrain from crossing if danger was apparent.

There was no flagman stationed at or near the place where Dr. Mixsell crossed, and proof was given of the rate of speed of the express train and of the existence of vapor and smoke proceeding from the accommodation train, and also negative testimony of the want of ringing the bell, or sounding the whistle on the locomotive of the express train. These subjects of proof were understood by

the court to be the grounds of negligence urged to justify a jury in finding that the defendant was negligent, and that such negligence caused the death of Dr. Mixsell. The proof on the subject of the want of ringing the bell, and of the running of the express train in the smoke was somewhat intensified by the evidence given on behalf of the defendant, the testimony indicating that the express train ran nearly half a mile in the cover of the smoke and vapor, so that, as the engineer testified, he could see only eight or ten feet ahead of him. I think the evidence was fully sufficient to justify the jury in finding the defendant guilty of negligence as they did so find.

But, as some of the facts proven which tended to show the negligence of the defendant also bore directly upon the question of the contributory negligence of the deceased, the court deemed it advisable to take the special findings of the jury upon specific questions of fact, as well as the assessment of damages, in order that a final disposition of the case might be made in one direction or the other upon the suspended motion of the defendant to dismiss the complaint or direct a verdict for the defendant. The object of the amendment giving this power to the court was evidently to avoid the necessity of new trials, and allow the courts at *nisi prius*, and, on appeal, to direct a judgment for the plaintiff for the amount found by the jury to be the damages, or for the defendant by the dismissal of the complaint or the direction of a verdict. It was also deemed a proper case to test the method by which the jury followed the direction of the court to analyze the leading facts upon which negligence of the defendant, or the deceased, might be predicated. In every charge in negligence cases the jury is instructed as to what matters may be facts indicating negligence of one party or the other, and to apply the evidence to the solution of those facts. The answers to the thirteen questions submitted in this case indicate how the jury in this particular action did so apply the evidence, and conclude as to the facts to be found upon the testimony, in arriving at their broader finding of negligence of the defendant, and want of contributory negligence of the deceased.

The questions and answers of the jury are as follows:

"First. Was the crossing used by the deceased a dangerous one? A. Yes.

"Second. If so, was it so known to the deceased? A. No.

"Third. If so, was it so known to the defendant? A. No.

"Fourth. Was a warning given by the ringing of the bell on the locomotive of the express train? A. No.

"Fifth. Could the deceased have heard the ringing of the bell on such locomotive? A. Yes.

"Sixth. Did the smoke obscure the view of the deceased of the approach of the express train? A. No.

"Seventh. Was the express train running at a dangerous rate of speed? A. Yes.

"Eighth. Did the deceased know that this express train was accustomed to run at a fast rate of speed? A. Yes.

"Ninth. Did the engineer have the right to suppose, from the facts of the situation, that no person knowing the probable passage of the express train would cross the tracks? A. No.

"Tenth. Did the deceased look and listen at the right time to ascertain if the express train was coming? A. Yes.

"Eleventh. Was the defendant guilty of negligence causing the death of deceased? A. Yes.

"Twelfth. Was the deceased guilty of any negligence which contributed to the accident? A. No.

"Thirteenth. How much is a fair and just compensation for the pecuniary injuries resulting from the death of Dr. Mixsell to the widow and next of kin; how much do you assess such damages? A. Thirty thousand dollars."

The court thereupon denied the motion to dismiss the complaint and to direct a verdict for the defendant, giving the defendant an exception. In order that the jury might be discharged, and to give counsel a better opportunity to present the legal questions, the motion to set aside the verdict and for a new trial being made in due time, the court directed the entry of the general verdict in favor of the plaintiff for the sum of $30,000 upon the findings of the jury. The counsel for the defendant moved to set aside the verdict and for a new trial, moving as to each specific finding as well as to the general verdict. At the opening of the subsequent argument the counsel for the defendant, in addition to his former motion, asked also that the complaint be dismissed.

In the view taken by this court it is unnecessary to consider the question of the negligence of the defendant. Assuming that there was sufficient evidence upon which the jury could find in favor of the plaintiff on that question, the weight of such finding bears all the more strongly upon the question of contributory negligence. The deceased was fully aware that he was approaching a place of danger, for, independent of his prior knowledge of the situation and the trains, the four-track railroad which he was intending to cross was itself a warning. Elliott v. Railway Co., 150 U. S. 245.

Added to the visible danger was that known to the deceased from the incoming of two trains about the time he was to be on the track, one of which would stop at the station and the other would fly by at a fast rate of speed. The jury has so found in answer to the eighth question of fact presented to them. Assuming that he faced each way in his gaze before he entered upon the track at all, the duty of using the eyes was not limited to that moment of time. He had thirty-four feet to pass before he came upon the express track, knowing that the moment was about the time, within sixty seconds either way, when that express train was likely to go by. If there was no vapor or smoke at the time he looked he could see the express train at any point from that opposite him to nearly a mile away. If there was no smoke or vapor and he looked in the direction from which the express train would come, he certainly saw it, and if he did see it no notice of its approach was necessary. It might also be said that no notice or warning of its approach would be necessary to one who knew that it was due at about that time, if, by the use of sight, the train could be seen. From the fact of collision it is indisputable that the train could have been only twenty or thirty rods away when he is supposed to have looked, if he proceeded directly across the track, for at the gait of walking the time he took to go some thirty-four feet would have enabled the express train to pass over the tracks eight to twelve times as far. The collision being a certain fact it is equally as certain that the train could not have been other than within easy eyesight at the time he is supposed to have looked. If he took the situation in, seeing the train, and supposed that he could pass over before it reached him, he was taking upon himself the chances and a risk not within ordinary prudence. With no obstruction to his eyesight, the fact of his sight of the train is certain if he looked in that direction, and the fact is also equally certain that he determined to cross ahead of it while it was coming, as he knew according to the finding of the jury and the evidence, at a fast rate of speed.

The only other solution from the facts possible, and one which is preferable, because it is the more probable, notwithstanding the finding of the jury, and because it was perhaps conclusively established by the evidence, is that the express train was hidden by the smoke and vapor of the accommodation train pulling in ahead. This circumstance undoubtedly was the cause of the want of notice by the deceased of the approaching train. He either

thought the express train had gone by or had not yet come, not seeing it, while in fact it was not many rods away, obscured by the vapor and smoke. Assuming the deceased to have possessed the ordinary instincts of care for his own life, it is evident that the concealment of the express train by this smoke and vapor led to the act of deceased which occasioned his death. The presence of that smoke and vapor, therefore, was known to him. It was evident. It was also known to the deceased that it covered the very track upon which that express train, which he knew was to pass at about that period of time at a fast rate of speed, would bring to him a possible source of great danger.

What then was his duty? If the track had been clear and he had shut his eyes as he walked over it, beyond doubt his voluntary deprivation of the power of sight would have been contributory negligence. Does not his voluntary act in stepping upon the track at a time when his power of sight was practically useless subject him to the same charge? It was a trifling matter for him to have remained off the tracks altogether, or even to have not passed beyond the second track until he was sure that the express train had passed, knowing that he could not see that train on account of the cause which necessarily hid it. It was a very serious danger to voluntarily encounter in stepping upon the track without the power of sight and with the knowledge of the probable risk.

I think it quite clear that all of the inferences in the case not only show that the plaintiff has not given sufficient evidence tending to prove that the deceased was not guilty of contributory negligence, but that it is affirmatively shown that Dr. Mixsell in passing upon the point of known danger acted without ordinary prudence under the circumstances of this case. Vahue v. N. Y. Cent. & H. R. R. R. Co., 18 App. Div. 452; Lortz v. N. Y. Cent. & H. R. R. R. Co., 83 Hun, 271; Foran v. N. Y. Cent. & H. R. R. R. Co., 64 id. 510; Whalen v. N. Y. Cent. & H. R. R. R. Co., 40 N. Y. St. Repr. 566.

Some of these cases refer to the decision of the Court of Appeals in the case of McNamara v. N. Y. Cent. & H. R. R. R. Co., 136 N. Y. 650. In that case undoubtedly the jury might have found from the evidence that a curve in the line of the road prevented the deceased from seeing the approach of the locomotive, and that the smoke was not the primary cause.

The present case is all the stronger on account of the knowledge of the deceased that there was no flagman to warn people of an

approaching train; that the place where he crossed was only a permissible crossing and not one provided for public use by the railroad, and that the momentary danger was then greater than at other periods of the day.

The verdict in this case must, therefore, be set aside, and not only the general verdict but the findings of fact that the crossing was not known to the deceased to be a dangerous crossing; that the smoke did not obscure the view by the deceased of the approach of the express train; that the deceased looked and listened at the right time to ascertain if the express train was coming, and that the deceased was not guilty of negligence which contributed to the accident.

The farther question arises in the case as to the order to be entered upon setting aside such verdict. The ordinary rule is that a new trial should be granted. This kind of an order, however, would not accomplish the purposes intended by the practice adopted under the Code of Civil Procedure in this case. That purpose is to give final judgment for the plaintiff or the defendant upon the findings and the evidence. The motion to dismiss the complaint has been once denied, but it may be reasonably held that with the verdict set aside the court has power to reconsider such a motion to dismiss and give judgment accordingly, or to set aside the verdict on account of such erroneous ruling. Code Civ. Pro., § 999. If the evidence, and those findings of the jury which are sustained by the evidence, show that judgment should be given for a dismissal of the complaint, why may not that be accomplished within the spirit of our Code of Civil Procedure enlarging the scope of the power of the court to direct a judgment after a verdict as it existed under the common-law practice? Under the old practice a judgment *non obstante veredicto* might be rendered where the plea confessed and avoided the cause of action, but it was held that the matter in avoidance was insufficient. Freeman Judg., § 7.

This practice of taking a verdict under the provisions of section 1187, as they now stand, was followed by Mr. Justice Dugro in the case of Caspers v. Dry Dock Railroad Co. After the submission of specific questions of fact and the amount of damages to the jury and their verdict thereon in favor of the plaintiff, the court set aside the verdict and dismissed the complaint. This decision was affirmed by the Appellate Division, First Department, with an opinion commending the practice adopted in that case.

Same case, Appellate Division, First Department, MSS. In another case (Guilfoyle v. Seemans), Mr. Justice Dugro, recently, upon such a submission to the jury of special findings, and for the amount of damages, took the verdict, allowed it to be entered, and then set it aside and dismissed the complaint.

From time immemorial courts have had the power to set aside the verdict of juries and render judgment, or grant a *venire de novo*, and no special statutory authority was necessary for that purpose. To save, however, the formality and unnecessary labor and delay of making a bill of exceptions, or a case, where a motion to set aside the verdict, or to grant a new trial, was made before the judge who presided at the trial, and who knew, therefore, all of the questions arising in the case, statutory authority was given in this State, which is now condensed in section 999 of the Code of Civil Procedure, to allow the motion to be made upon the minutes of the judge presiding at the trial. That section is no impairment of the power previously existing, but gives additional authority without the necessity of a bill of exceptions or a case. By that section the judge may entertain the motion to set aside the verdict or a direction dismissing the complaint, and may grant a new trial upon the exceptions in case the verdict is excessive or insufficient in damages, or contrary to the evidence or to the law. The section recognizes that when a judge may entertain a motion he may necessarily, as a result of such a consideration, direct that the verdict or the direction dismissing the complaint be set aside.

Under this section of the Code it is manifestly improper to terminate the right of the plaintiff to a fair trial upon his claim where the verdict is set aside for any cause other than that the proof made in the case shows he is not entitled to recover. The plaintiff should be entitled to a new trial, even if the verdict be set aside, if the decision be that some error has been committed to the prejudice of the defendant, short of the error in denying a motion to dismiss the complaint or to direct a verdict upon the merits. Where the plaintiff has, however, had a full opportunity to prove his case, and the judgment of the court upon the facts proven is that he is not entitled to recover because of lack of merits, I know of no reason which should give him a new trial, when, if the court had ruled rightly on the motion to dismiss the complaint or direct a verdict before the jury had passed upon the case, the result would have been final and no new trial would have been awarded. It is hardly fair to punish the defendant and

give the plaintiff favor because the court erred in not originally sustaining the position taken by the defendant.

It would, therefore, seem, not only within the theory of section 1187 of the Code of Civil Procedure, but also a just and proper practice, where the whole case upon the evidence and the findings of the jury demonstrates that the defendant should succeed, in placing the judgment of the court in the form of awarding judgment in favor of the defendant, instead of granting a new trial, so that, if the judgment of the trial court is correct upon the merits, that judgment may be undisturbed, and if, on the contrary, the appellate courts differ with the trial court upon the main question, those courts upon appeal may award final judgment in favor of the plaintiff upon the verdict given.

In the case of Riggs v. Palmer, 115 N. Y. 506, where the Court of Appeals had the distinction of first announcing the principle that a murderer cannot take from his murdered victim the property which was the object of his crime, the practice of terminating a litigation, where the question involved the legal conclusion drawn from the facts as proven, is strikingly exemplified. The action was an equitable one, brought by the daughters of the murdered man to enjoin and prevent the murderer from possessing and squandering the property he claimed to inherit through his crime, and the trial court dismissed the complaint, though finding the facts in favor of the plaintiffs, upon the ground that the statute gave the property to the murderer despite his crime. The judgment of the trial court was affirmed by the General Term and an appeal was taken to the Court of Appeals by the plaintiffs. That court, in deciding the principle stated, reached the conclusion that the relief asked for by the plaintiffs should be granted, and awarded specific and full equitable relief as directed by the court in its opinion. See p. 514.

Believing that plaintiff, who shows no right upon a full and fair trial to a recovery, should not have a new trial, because the complaint was not dismissed when it ought to have been dismissed, or a direction for a verdict given when it ought to have been given in favor of the defendant, in passing upon the relief to be granted in this case, I deem it proper to set aside the verdict as indicated, and also to dismiss the complaint, with costs.

Ordered accordingly.

ANN CURTIN, Respondent, *v.* THE METROPOLITAN STREET RAILWAY CO., Appellant.

(Supreme Court, Appellate Term, December, 1897.)

Negligence — Duty of a pedestrian to look again, after leaving the sidewalk and while crossing a street.

Where a pedestrian has, in the day-time, looked in both directions before leaving a sidewalk and has seen no cable car approaching which would intercept her passage, and the street is free from vehicles and obstructions, and such a car gives no signal nor warning of its approach, the question whether she was guilty of contributory negligence in passing along a street crossing, while looking straight ahead and without looking again for approaching cars, is one proper for the consideration of the jury.

APPEAL by defendant from an affirmance by the General Term of the City Court of a judgment for plaintiff, entered upon the verdict of a jury.

Charles F. Brown and Henry A. Robinson, for appellant.

Charles Steckler, for respondent.

DALY, P. J. The plaintiff was injured by an upbound cable car on Ninth avenue, while she was attempting to cross the avenue from west to east, at the southerly crossing of One Hundred and First street in the day-time. There was evidence that the car was approaching at full speed, and that no bell was rung and that the gripman did not apply the brake. As the car was, however, stopped within three feet after it struck the plaintiff, the brake must have been applied before the collision; the testimony being that the car could have been brought to a stop in twenty feet. It is argued by the appellant that notwithstanding the gripman's alleged negligence in not giving warning, or stopping the car, the plaintiff's negligence must have contributed to the injury, since she could not have failed to see the car in time to avoid a collision if she had looked down the track before attempting to cross it. She testified that she looked up and down the track before leaving the sidewalk and saw no car approaching, and that she then started

to cross the avenue, and did not look up or down again, but looked straight ahead. When she was between the up track and the down track, the car was then, according to her own witness, fifteen to twenty-five feet away. It is manifest that had she looked to see if a car was approaching on that track before crossing, she could have observed this car and must have perceived the danger of crossing in front of it. Was she negligent in not looking, and does that negligence preclude her recovering in this action? The contention of the plaintiff's counsel is, that although she failed to look, yet the gripman, in the exercise of ordinary care, could have seen her in time to stop the car and avoid the accident, and so his negligence was the sole proximate cause of her injury. An extension of this doctrine to all cases of injury to pedestrians at street crossings would cast the whole burden of care upon the persons in charge of vehicles, and relieve pedestrians of all responsibility for the exercise of ordinary prudence. Where by stress of circumstance, or error of judgment, a pedestrian is placed in peril and injury may be avoided by the exercise of ordinary care on the part of one in charge of a vehicle, the responsibility for the accident will rest with the latter in spite of the fact that some negligence on the part of the pedestrian may have originally put him in the place of danger. But where the danger is one into which the latter has walked blindly, indifferent to any existing peril, it will not do to claim that his negligence did not contribute to the accident.

An illustration of the former case is found in Fandel v. Third Ave. R. R. Co., 15 App. Div. 426, where a woman starting to cross the avenue from west to east stopped at the west track to let a south-bound car, followed by a truck, pass her; then waited between the tracks to let a north-bound car pass her on the east track, and then, perceiving another north-bound car advancing, started to cross in front of it, but was overtaken because, as the jury may have found, its speed was accelerated as she was crossing. The second case is illustrated by Doller v. Union R. R. Co., 7 App. Div. 283, where a man attempted to run across the track on which a car was approaching at a distance of fifteen to twenty feet, and was struck as he put his foot on the track.

It is said that the pedestrian crossing the street at the usual street crossing may rely upon the observance by the person operating the car of his duty of vigilance at such a point, and of having

his car under such control as to avoid collision with foot passengers. It may with equal propriety be said that the gripman or motorman of the car has a right to rely upon the observance by pedestrians of the duty of looking to see that it is reasonably safe to cross the track. The fact is that neither party is relieved from the duty of active vigilance by the assumption that the other will perform his duty. It is certain, however, that in considering the question whose negligence is the proximate cause of the accident, the jury may take into consideration the fact that the pedestrian is an old, or infirm, person, a woman, or a child. In a case where it appeared that the driver of a car at forty feet distance was able to see two women and seven small children, two of them carried in arms, endeavoring to cross a street at a crosswalk, it was held that a duty of active vigilance was imposed upon him to have his horses and car well under control. Wihnyk v. Second Ave. R. R. Co., 14 App. Div. 515. A car driver must be alert and watchful to avoid injury to those who, because of tender years, advanced age, or enfeebled physical condition or accident do not get off the track at the near approach of a car. Nugent v. Met. St. R. Co., 17 App. Div. 582-585. In approaching the regular crosswalk, the drivers of vehicles must anticipate the probable presence of pedestrians and be on their guard to avoid injuring them. Murphy v. Orr, 96 N. Y. 14.

In this case the evidence was such as to present a fair question to the jury as to whether the accident was not caused by the failure of the gripman to observe a woman in full view and at a sufficient distance on the crosswalk, approaching his track, and to have his car under such control that he could have avoided a collision with her. He did evidently apply his brake, but not in time to prevent the accident, and it was a fair question under the circumstances whether he should have done it sooner. The case is not, therefore, wholly without evidence to support the verdict; and the facts do not show contributory negligence as a matter of law, since the plaintiff testified that she looked up and down the avenue for approaching cars before crossing the street; the case for that reason being distinguishable from Cowan v. Third Ave. R. R. Co., 1 N. Y. Supp. 612; and, as we cannot consider the question of preponderance of proof, we have no power to disturb the judgment of the trial court on the facts.

In the case of the drivers of vehicles about to cross the tracks

of a city railroad, we have held that, under certain circumstances, there is a duty of looking for an approaching car immediately before the attempt to cross is made. Bauman v. Met. St. R. R. Co., 21 Misc. Rep. 658; Winch v. Third Ave. R. R. Co., 12 id. 403. In the case of McQuade v. Met. St. R. Co., 17 Misc. Rep. 154, we found that the facts clearly showed that the plaintiff was injured by negligently walking against a passing car, and not in front of it, so that there was no apparent neglect of duty with respect to her by the person operating the car.

The question of contributory negligence must be decided upon the facts of each case; and whether it is negligent for a pedestrian not to look for an approaching car when about to cross a railroad track depends upon circumstances. If there has been no previous opportunity to look for approaching vehicles, or if such opportunities as present themselves have not been used until the pedestrian has reached the track, it would seem that he should then look; but if he has looked in both directions before leaving the sidewalk and seen no car approaching which would intercept his passage and the street is free from vehicles and all obstructions to a full view, and no bell is sounded by approaching car nor other warning of danger given, then it is a question for the jury whether he should again look up or down before crossing the track. Such a state of facts is presented by the record before us, and we cannot say that the evidence was insufficient to sustain a finding that there was no contributory negligence on the part of the plaintiff.

Judgment affirmed, with costs.

BISCHOFF, J. (concurring). The plaintiff's attempt to cross the street was noted by a passenger when the car was seventy-five feet distant from the point where her course should cross the track. Certainly the attempt was as readily to be observed by the gripman, and it was shown that he could have stopped the car within twenty feet. It was competent to the jury to find that the exercise of reasonable care by the gripman would have led to his reducing the speed of the car when the plaintiff's intention to cross became apparent, and, if so, she was justified in relying upon that act being performed. When she looked up and down the street, before crossing, the car was not sufficiently close to be necessarily taken as a threatened danger, and its proximity when she came upon the track could be viewed by the jury as resulting only from

the gripman's failure to employ that degree of care which she was entitled to expect from the defendant, or its servants, and in relying upon which expectation she was not negligent as a matter of law. I, therefore, concur for affirmance.

McAdam, J., concurs.

Judgment affirmed, with costs.

The Eleventh Ward Bank, Appellant, *v.* George Heather, Impleaded, Respondent.

(Supreme Court, Appellate Term, December, 1897.)

Supplementary proceedings — An examination of the debtor should not be denied merely because he has real property subject to levy.

The right, secured to a judgment creditor by section 2435 of the Code of Civil Procedure, to examine a judgment debtor in supplementary proceedings upon the return of an execution unsatisfied, cannot be denied the creditor unless he has been in collusion with the sheriff or has been guilty of fraud relative to the return; and an order, vacating an order for an examination of the judgment debtor, made upon his affidavit that he is seized and possessed of real property subject to levy upon execution, is improper.

Eleventh Ward Bank v. Heather, 21 Misc. Rep. 539, reversed.

Appeal by plaintiff, a judgment creditor of the defendants, from an affirmance on September 27, 1897, by the General Term of the City Court, of an order of the Special Term, made July 1, 1897, vacating an order for the examination of the respondent George Heather, made June 21, 1897, in proceedings supplementary to execution.

G. S. P. Stillman, for appellant.

Thomas D. Adams and Adams & Adams, for respondent.

Daly, P. J. The plaintiff instituted supplementary proceedings upon the return of an execution against property unsatisfied,

and his affidavit set forth all the jurisdictional facts to entitle him to an order for the examination of the judgment debtor. Such an order was granted, but upon the return day it was vacated upon the motion of George Heather, one of the defendants, upon his affidavit showing that he was seized and possessed of real property subject to levy under execution. The right to examine a judgment debtor in supplementary proceedings is not discretionary when the affidavit for such order complies with the requirements of the Code. Upon proof of the facts the judgment creditor "is entitled" to the order. (Code, § 2435.) As he is entitled to the order he is, as matter of course, entitled to the examination under it, unless any jurisdictional fact is disputed by the judgment debtor, or fraud or collusion between the sheriff and the creditor is shown. An attack upon the truth of the sheriff's return of *nulla bona* does not affect the right to the examination. The jurisdictional fact is the return itself. The truth of the return cannot be inquired into collaterally, but only upon motion to set it aside. The court will not go behind the return except upon such a motion. Sperling v. Levy, 10 Abb. Pr. 426; Tyler v. Whitney, 12 id. 465.

The judgment debtor's affidavit to the possession of property ought not to hinder the examination. If he has property sufficient to satisfy the execution in full, he can sell it and pay the judgment. If he does not do so, it is *prima facie* evidence that the property will not satisfy the judgment, and the creditor should be afforded every facility in his inquiry for further assets. In this case, the court, without evidence that the property disclosed was sufficient to pay the judgment in full, or even any part of it, refused to allow the examination, thus putting the creditor to the delay and expense of a second execution and a probable second resort to supplementary proceedings, and this without any fault of his own, but for relying on the sheriff's return. In fact the judgment creditor showed by affidavit the existence of prior unsatisfied judgments, some by confession, against the debtor, aggregating many thousands of dollars, thus confirming the probability that the property disclosed was insufficient to satisfy the plaintiff's execution. The debtor in his affidavit refrained from any statement as to whether the real estate was incumbered, or as to its value. But even if there were nothing in the case to show that the property disclosed would probably not satisfy the plaintiff's judgment in whole, or in part, the authorities are in favor of his right to the

examination upon the sheriff's return of no property, since it is not shown that such return was collusive or fraudulent.

When the remedy of the creditor, upon the return of execution unsatisfied, was by creditor's bill, it was held that the motion for receiver in his suit should not be denied upon proof that the debtor had real estate upon which he had requested the sheriff to levy, and that instead of doing so the sheriff had returned the execution unsatisfied; because it was not shown that the property was sufficient to satisfy the whole judgment, or that the return was fraudulent, or collusive. Storrs v. Kelsey, 2 Paige 418. The fact that there was property which the sheriff ought to have taken or sold will not affect the right of the judgment creditor to supplementary proceedings. Fenton v. Flagg, 24 How. Pr. 499; 4 Wait Pr. 132. The sheriff has a discretion in determining whether a sale of the property will yield anything to pay the judgment. He acts according to his information and makes his return accordingly. Even where the judgment debtor took the proper course and moved to set aside the return of *nulla bona* as false, and it appeared that the sheriff, after a levy, had become satisfied that it would not bring sufficient over previous liens, and after consultation with plaintiff's attorney returned *nulla bona* and the affidavits on the motion were contradictory as to the value of the property, the motion was denied. Evans v. Parker, 20 Wend. 622. A sheriff, after levy, being satisfied that an attempt to sell would be fruitless by reason of previous liens, may return *nulla bona*. Champenois v. White, 1 Wend. 92. The sheriff's return of no property furnishes sufficient evidence of the exhaustion of the legal remedies against the debtor to authorize the institution of a suit to reach other property possessed by him. Wright v. Nostrand, 94 N. Y. 31.

The authorities upon which the respondent relies do not conflict with the view we take that the judgment creditor, upon the return of his execution unsatisfied, is entitled to the examination of the judgment debtor in supplementary proceedings, notwithstanding that the latter shows that he is seized and possessed of property upon which the execution might have been levied, unless he can also show fraud, or collusion, between the sheriff and the plaintiff. In Importers & Traders' Nat. Bank v. Quackenbush, 143 N. Y. 570, it was held that the creditor's remedy at law was not exhausted, since it appeared that his execution was not issued until after his judgment had ceased by lapse of time to be a lien on real property. In Moyer v. Moyer, 7 App. Div.

523, the court refused to compel the transfer of real property to a receiver in supplementary proceedings because a sale by the receiver would cut off the right of redemption which the debtor would have upon a sale under execution, and the creditor was left to the latter remedy. In that case also the court found strong evidence of collusion and an attempt to exonerate one judgment debtor by collecting the judgment out of the other. The court also found the return to be false, though attacked collaterally, because the order directing the transfer to the receiver showed the defendant to be seized and possessed of property subject to levy. The proofs in that case also showed that the defendant's property was worth, above incumbrances, far more than was sufficient to satisfy the plaintiff's judgment in full. And, finally, the court determined that there was no necessity for the transfer, the title to real property vesting in the receiver by operation of law; citing Manning v. Evans, 19 Hun, 500, and other cases.

We do not decide that the court would not have the right to refuse the appointment of a receiver, if it appeared that the property of the judgment debtor, subject to levy, was sufficient to satisfy the judgment, or if for any good reason it appeared inequitable to make the appointment; but it is manifest that such a conclusion should not be reached, in view of the sheriff's return, until the creditor, by examination under his order, had had an opportunity of ascertaining the facts, and of ascertaining if the debtor had other property to which resort should be afforded the creditor.

The orders of the General Term and Special Term should be reversed, and the case remitted to the City Court, Special Term, to proceed with the examination under the order of June 21, 1897, with costs to appellant.

McAdam and Bischoff, JJ., concur.

Orders of General and Special Terms reversed and case remitted to the City Court to proceed with the examination, with costs to appellant.

James E. Nichols et al., Appellants, *v.* Philip Nehrbass, Respondent.

(Supreme Court, Appellate Term, December, 1897.)

1. Sale — To whom the credit was given — Evidence.

Where the issue, in an action for goods sold, brought against a father, is whether he or his son, bearing the same Christian name, bought

the goods, the father may properly be allowed to show that his son paid the rent of the store; that the father had no interest in it; that the name of the son was displayed on the sign and, by the testimony of daughters, engaged in the store, that they never knew their father to order goods.

2. Same — Evidence — Similarity in name.

Where two persons sought to be charged for goods sold, both bear the name of Philip Nehrbass, it is proper for the court to charge the jury that the fact that the name — Philip Nehrbass — was signed to receipts given for the goods upon their delivery is no evidence that the father ordered them.

APPEAL by the plaintiffs from an affirmance by the General Term of the City Court of a judgment in favor of the defendant entered upon the verdict of a jury.

William S. Maddox and Hotchkiss & Maddox, for appellants.

A. H. Berrick, for respondent.

DALY, P. J. The plaintiffs, who are wholesale grocers, sued to recover for goods to the value of $110.02 furnished between November 5 and November 28, 1893, to the retail store No. 64 Avenue B, and the question submitted to the jury was whether the goods were ordered by the defendant or were furnished to any business in which he was interested. It appears that he had a son bearing his name, and the defense was that the business at Avenue B belonged to the son, and was opened in July, 1893; that previous to that date the defendant had a place of business in Fourth street and dealt with plaintiff, but that that business was discontinued and defendant went to Europe for his health before the place in Avenue B was opened. He returned in September, and lived with his son and daughters over that shop during the period that the goods in suit were ordered and delivered. The plaintiffs' salesman swore that the goods were personally ordered by the defendant.

The latter denied it, and the trial court admitted, on behalf of defendant, evidence that his son paid the rent of the store; that the father had no interest in it; that a sign bearing the name Philip Nehrbass, Jr., was displayed there, and the testimony of the sisters

of Philip Nehrbass, Jr., who were in the store, one part of the time and one all the time, that their father never, to their knowledge, gave an order for goods. To the admission of this evidence the plaintiffs excepted.

It was competent, upon the issue as to whether these goods were sold to the defendant, to show that the business to which they were furnished did not belong to him; for, although the plaintiffs' salesman testified to direct orders for the goods given personally by the defendant, the personal transactions were denied, and if the jury were in doubt on that point, they could have found for the plaintiffs if they believed that the business belonged to the defendant and that the goods were supplied to it; as he would be liable then as an undisclosed principal. That very issue was submitted to the jury on the charge of the court, without objection, the trial judge saying: "The issue that is presented here is that the defendant is not liable for the debt inasmuch as he never contracted it; that the goods were not furnished for any business in which he was interested, and that he never ordered them." Having acquiesced in the submission of the question of liability on the issue as to actual ownership of the business, plaintiffs cannot now argue that the evidence referred to was irrelevant.

The testimony of the sisters of Philip Nehrbass, Jr., who assisted in the business, that they never knew of orders for goods being given by the father, was admissible as showing the absence of acts of control or interference with the business on his part.

One of these sisters was always in the store, and was in a position to know whether he gave orders; the other was present part of the time, and her testimony, of course, related to that part of the period in question. Their evidence was of the same character as that offered to show that the business in which the goods were ordered was the son's and not the father's.

There was but one exception taken by plaintiffs to the charge to the jury. The defendant asked the court to charge "that the fact of the name of 'Philip Nehrbass,' signed to the receipts, is no evidence that he ordered the goods." The court charged it, and the plaintiffs excepted; and the question is whether the instruction was proper. The receipts in question were given under the four several deliveries of the goods, at the Avenue B store, on November 6th, 14th, 17th and 28th, respectively. Each was signed Philip Nehrbass, and the signatures to three of them were in the

hand of one of the sisters, but the fourth and last was signed by the defendant. This fact afforded ground for inferring that he had some interest in the business, and also tended to corroborate the testimony that the goods were originally ordered by him. The court did not charge the contrary; and, in fact, in response to a previous request of the defendant to charge that the receipts were not evidence that the defendant gave the order, or that credit was extended to him, expressly refused to so instruct the jury.

The charge to which the plaintiffs excepted evidently referred to the inference which it was thought might be drawn from the *form* of the signatures to all four receipts, which purported to be that of Philip Nehrbass, Sr., and not Philip Nehrbass, Jr., since it was written simply "Philip Nehrbass." The defendant asked an instruction that the fact that the name was so signed, or written, in all the receipts, was no evidence that he ordered the goods, and that was correct. The instruction did not refer to the effect of the admitted signature to the last receipt, but to the form of all of them. As to three of them, they were not in his hand, but in his daughter's; and while her act might be significant, with respect to the ownership of the business, it had no bearing on the issue as to the personal transaction between the defendant and the plaintiffs' salesmen. The charge was, therefore, correct when considered in connection with the instructions already given, and could not have been understood by the jury as a ruling with regard to the one admitted signature of defendant instead of the form, merely, of all the signatures. No request for instruction on this, or any, subject was made by plaintiffs, who could have cleared up any ambiguity or uncertainty by a timely suggestion.

The judgment should be affirmed, with costs.

McAdam and Bischoff, JJ., concur.

Judgment affirmed, with costs.

THOMAS BOGAN, Respondent, *v.* MOSES G. WRIGHT et al., Appellants.

(Supreme Court, Appellate Term, December, 1897.)

1. **Attorneys — Compensation — Percentage on renewal lease.**

Where landowners agree to give attorneys, as a compensation for their services in procuring a leasing of their lands, by the commissioner of public works of the city of New York, for the purpose of a temporary bridge, ten per cent. of all rentals received by them from the city, and a lease is made with the city for the period of three years "with the privilege of two renewals of one year each upon the same terms and conditions," the attorneys, or their assignors, become entitled to ten per cent. upon a renewal lease, made upon the part of the city and in the exercise of its option, as the renewal is not an independent leasing but is a mere continuation of the preceding term.

2. **Appeal — What may be considered.**

The Appellate Term cannot, upon appeals, from the City Court of New York city, consider the weight of evidence, but merely exceptions taken upon the trial.

Bogan v. Wright, 21 Misc. Rep. 529, affirmed.

APPEAL by defendants from an affirmance by the General Term of the City Court of a judgment in favor of plaintiff.

Black & Kneeland, for appellants.

Frank Thorn, for respondent.

MCADAM, J. The legislature enacted a law for the construction of a new bridge over the Harlem river at Third avenue. The act (Laws 1892, chap. 413) contained a provision authorizing the commissioner of public works, with the approval of the board of estimate and apportionment, to lease sufficient lands on one or both sides of the Harlem river, for the term of three years or more, for the purpose of a temporary bridge during the period of the construction of the new one.

The defendants owned property on both sides of the river, and they employed the law firm of Gumbleton & Hottenroth, the plaintiff's assignors, to represent them before the public officials having

authority in the matter for the purpose of arranging for the amount of rental and other terms of a lease. At the time of the retainer it was agreed that the assignors were to receive for their services ten per cent. of all rentals received from the city by the defendants. A lease to the municipality was made through the agency of the assignors for the term of three years from June 19, 1893, at $13,000 per year, payable monthly, " with the privilege of two renewals of one year each upon the same terms and conditions," etc.

Gumbleton & Hottenroth thereafter presented their bill for $3,900, being ten per cent. on the three years' rental, which the defendants paid. The percentage was to have been paid monthly as the rent was collected by the lessors, but in consideration of a discount for payment in a lump sum the defendants adjusted the demand in three payments.

The lease expired July 1, 1896, and the municipal authorities, under the option of renewal contained in the lease, elected to and did take a renewal thereof for the term of one year, two months and eleven days from June 19, 1896.

The complaint alleges that under such renewal the defendants have collected $1,083.33 rent for the month of July, 1896, and that under the arrangement with Gumbleton & Hottenroth, the law firm became entitled to ten per cent. thereof, to wit, $108.33; and the action is by the plaintiff as assignee of said demand to recover the same.

The question is whether the right to the ten per cent. terminated with the three years of the original lease or extended to the renewals authorized by it.

The renewal was not an independent leasing by the defendants, and nothing more or less than a continuation of the former term, the city having exercised the option of continuing it conferred by the original demise. Chretien v. Doney, 1 N. Y. 419; House v. Burr, 24 Barb. 526; Woodcock v. Roberts, 66 id. 498; Crawford v. Kastner, 26 Hun, 440; Kelso v. Kelly, 1 Daly, 419; Hansauer v. Dahlman, 25 N. Y. Supp. 277; Kramer v. Cook, 73 Mass. 550; Delashanan v. Berry, 20 Mich. 292; Orton v. Noonan, 27 Wis. 272; Id., 300; Paulet v. Cook, 44 N. H. 512; Dix v. Atkins, 130 Mass. 171; Long v. Stafford, 103 N. Y. 274; Kearney v. Metropolitan Elevated Railway Co., 129 id. 76; Witmark v. Same, 149 id. 393.

The defendants contend that when they settled the bill of $3,900 all claim of the assignors was satisfied and discharged. This did

not necessarily follow. If the understanding was, as the assignors testify, that the ten per cent. was to apply to all rentals received from the city on the transaction, then it was to continue while the transaction continued, and this is what the jury on conflicting evidence found the contract to be.

On appeals from the City Court we cannot consider the weight of evidence. All we can do is to consider the exceptions taken during the trial (Rowe v. Comley, 11 Daly, 317; Briscoe v. Litt, 19 Misc. Rep. 5, 8); and the only one of these which requires comment is that taken to the refusal to dismiss the complaint. This exception was not put upon the ground that the plaintiff had failed to prove an agreement covering the period beyond the three years, but on the assumption that there was no distinctive renewal of the lease, the continuation being under a newly-executed writing. There was no merit in this point, for the exercise of the option by the city made the original contract with the city a continuous one to the expiration of the renewal, whether evidenced by the original lease or by any other writing given to effectuate the transaction.

The defendants plead "that the alleged agreement set forth in the complaint was not to be performed within a year from the time of the making thereof, and was not in writing." The agreement on the part of the plaintiff's assignors might by its terms be performed within one year from the time it was made, and was by them fully performed within that time; and the defendants within that period were put in a position to receive every benefit the assignors' services could confer. Brown Stat. Fr., § 286; Blanding v. Sargent, 33 N. H. 239; 66 Am. Dec. 720; Sheehy v. Adarene, 41 Vt. 541; 98 Am. Dec. 623; Rogers v. Brightman, 10 Wis. 68.

It was probably for this reason that no ruling upon the applicability of the statute was called for or made by the court below, and, consequently, no exception taken to enable us to review the question, which must be regarded as waived.

No motion to dismiss was made at the close of the entire case, and no request for the direction of a verdict; and the case was disposed of by the jury as one involving simply a conflict of evidence.

We find no error that we have power to review, and the judgment must be affirmed, with costs.

DALY, P. J., and BISCHOFF, J., concur.

Judgment affirmed, with costs.

DAVID DISE, Respondent, *v.* THE METROPOLITAN STREET RAILWAY Co., Appellant.

(Supreme Court, Appellate Term, December, 1897.)

Negligence — Rights of cars and vehicles at street crossings — Contributory negligence.

Proof that when, about 8 o'clock at night, the driver of a truck, going westerly, attempted to cross Broadway in the city of New York at a street crossing, he looked north and south on that thoroughfare and saw a car coming north on the easterly track and distant about a block, and also saw another car coming south on the westerly track and distant about 150 feet, and that his truck was subsequently struck and he was injured by the car on the westerly track, does not, in view of the rule that cars have, at street crossings, no greater right than vehicles, make him guilty of contributory negligence as matter of law; and the question of negligence and of contributory negligence are proper for the consideration of the jury.

APPEAL by defendant from an affirmance by the General Term of the City Court of a judgment in favor of plaintiff.

H. A. Robinson (Charles F. Brown, of counsel), for appellant.

Jacob Manheim, for respondent.

MCADAM, J. According to the facts as found by the jury the plaintiff, at about 8 o'clock on the evening of October 21, 1895, was driving a horse drawing a single truck westward along Bleecker street. As he approached Broadway he looked up and down that thoroughfare and saw one of defendant's cars about a block away coming up town, and another about 150 feet away coming down town. Finding the roadway clear the plaintiff undertook to cross Broadway from east to west. He got over the easterly track in safety, but while crossing the westerly track the south-bound car struck his truck, throwing him off, whereby he sustained serious personal injuries. While the plaintiff's evidence was a little confused and contradictory upon his cross-examination, the facts stated remained substantially unchanged.

The witnesses produced by the plaintiff testified that the car was

going very fast, one putting the speed at a mile in five minutes, and both agreeing that the rate at which it was going was not slackened at street crossings for some time previous to the collision. Abraham Goodman, a passenger on the car, saw the truck cross the track and remarked to a companion of his that the car would catch the truck (meaning that it would run into it), and immediately the collision took place.

Considering the fact that at street crossings the defendant in running its cars had no rights superior to those possessed by drivers of vehicles moving in the street crossed (O'Neil v. R. R. Co., 129 N. Y. 125; Reilly v. Third Ave. R. R. Co., 16 Misc. Rep. 11; McDonald v. Third Ave. R. R. Co., id. 52; Brozek v. Steinway R. R. Co., 10 App. Div. 360), it will not do to hold as matter of law, that, under the circumstances, the defendant was free from fault, or the plaintiff guilty of contributory negligence.

To justify a nonsuit on the ground of contributory negligence it must appear clearly that no construction of the evidence or inference drawn from the facts will warrant a contrary conclusion. Stackus v. R. R. Co., 79 N. Y. 464; Thurber v. R. R. Co., 60 id. 326; Massoth v. R. R. Co., 64 id. at p. 529; Friess v. R. R. Co., 67 Hun, at p. 210.

In an action to recover damages for negligence the plaintiff is entitled to have the issue of negligence submitted to the jury when it depends upon conflicting evidence, or on inferences to be drawn from circumstances in regard to which there is room for a difference of opinion among intelligent men. Payne v. R. R. Co., 83 N. Y. 572. The trial judge properly denied the motion to dismiss, and sent the issues to the jury for determination.

The jury found, from the conflicting testimony, that the collision was caused by the negligence of the defendant's gripman, and that the plaintiff was free from fault, and awarded him $375, which is certainly a moderate sum.

There is no merit in the exceptions (two of which were waived on the argument), and the judgment must be affirmed, with costs.

DALY, P. J., and BISCHOFF, J., concur.

Judgment affirmed, with costs.

MORRIS BERNSTEIN, Respondent, *v.* MOSES R. CROW et al., Appellants.

(Supreme Court, Appellate Term, December, 1897.)

1. **Negotiable instruments — Bona fide holder — Acceptance for accommodation of payee.**

The defense that a draft was made and accepted without consideration and for the accommodation of the payee is not available, either to the drawer or to the acceptor, as against a bona fide holder for full value and before maturity.

2. **Same — Admission that a corporation accepted — Estoppel by pleading.**

Where the acceptor, a corporation, interposes to an action brought upon the draft an answer which expressly admits that it accepted it, that statement, under the provisions of section 522 of the Code of Civil Procedure, "must, for the purposes of the action, be taken as true," and the corporation cannot subsequently avail itself of allegations of the answer, stating that it received no consideration and that the acceptance was unauthorized, as a means of attacking the validity of the acceptance.

Bernstein v. Crow, 20 Misc. Rep. 729, affirmed.

APPEAL by defendants from an affirmance by the General Term of the City Court of a judgment in favor of plaintiff.

Franklin Bien, for appellants.

Wahle & Stone, for respondent.

MCADAM, J. The action is on a $250 draft drawn by the defendant Crow, October 16, 1896, on the New York & Westchester Water Company, payable five days after date to the order of Stephen J. Stilwell, and indorsed and delivered by Stilwell to the plaintiff. The draft was accepted by the drawee on presentation.

The action is defended by the drawer and the drawee, and the defense is that the draft was made and accepted without consideration for the accommodation of the payee. The plaintiff, however, is a *bona fide* holder of the paper for full value, before maturity, so that this defense is not available as against him either by the drawer or the drawee. 1 Pars. Notes & Bills, 279; Mechanics' Bank-

ing Assn. v. N. Y. & S. W. L. Co., 35 N. Y. 505; Bank of Attica v. Pottier & Stymus Co., 17 N. Y. St. Repr. 327; 4 Lawson's R. & R., § 1593; Farmers & Mechanics' Bank v. Butchers & Drovers' Bank, 16 N. Y. 125; Heuertematte v. Morris, 101 id. 63.

An attempt was made at the trial to attack the acceptance by the company as having been made by some person on behalf of the company without authority.

The second paragraph of the complaint alleges "That thereafter, on or about October 28, 1896, said note was duly presented to the New York & Westchester Water Co., who wrote across the face of it, in red ink, the following: 'N. Y., Oct. 28, 1896, accepted. Payable November 9, 1896. N. Y. & Westchester Water Co. C. F. Jordan.'"

This allegation of the complaint is expressly admitted by paragraph I of the answer of the company. And paragraph III of the company's answer avers: "This defendant, further answering and as a separate and distinct defense, avers: That the defendant New York & Westchester Water Company is a domestic corporation created by and under the laws of the State of New York, *and that this defendant accepted said note alleged in the complaint herein* without any consideration being received by it for the acceptance of such note, and that the person accepting the same had no authority from the defendant corporation to accept the same."

The company having expressly admitted the acceptance of the draft by it in the first paragraph of its answer, and reiterated the admission in the third paragraph, was not at liberty to thereafter deny the existence of such fact or to prove any state of facts inconsistent therewith. Fleischmann v. Stern, 90 N. Y. 110. There can be no issue as to an allegation not controverted.

The Code (§ 522) provides that "Each material allegation of the complaint, not controverted by the answer * * * must, for the purposes of the action, be taken as true." Merely making a counter-statement, or giving a different version of the matter from that contained in the complant, without denying the allegations therein contained, is not a controversion of such allegations. Wood v. Whiting, 21 Barb. 190, 198; West v. Am. Ex. Bank, 44 id. 175, 179; Abbott's Tr. Brief, § 552.

Having expressly admitted that it accepted the draft, the allegation of acceptance must, in the language of the Code provision referred to, "for all the purposes of the action be taken as true."

This construction of the pleadings eliminates from the record most of the exceptions relied on, and as there is no merit in the remaining ones, the judgment must be affirmed, with costs.

DALY, P. J., and BISCHOFF, J., concur.

Judgment affirmed, with costs.

PASQUALE CAPONIGRI, Appellant, *v.* PASQUALE ALTIERI and PIETRO ALTIERI, Respondents.

(Supreme Court, Appellate Term, December, 1897.)

Negotiable instruments—Usurious discount by private banks—Counterclaim by parties accommodated, for illegal interest paid.

Where an action is brought by a private and individual banker upon a note which he has discounted for the defendants, its maker and indorser, they may successfully interpose a counterclaim based upon allegations and proof that the note was given in part renewal of one for a larger sum which, with its earlier renewals, were discounted by the plaintiff for the defendants' accommodation at usurious rates, as the plaintiff thereby became liable to them, under the banking laws of the state (Laws of 1882, chap. 409, §§ 68, 69, re-enacted in 1892 by chap. 689, § 55) for the repayment of twice the amount of the interest paid, with an accompanying penalty of the loss of all interest; nor is this construction affected by the statement, contained in the statutes of 1882 and 1892, that it is intended to place private and individual bankers on an equality "in the particulars," referred to in the section, with national banks, as this phrase only means that there shall be a uniform penalty for usury in the case of state and national banks and of private and individual bankers.

Caponigri v. Altieri, 21 Misc. Rep. 510, affirmed.

APPEAL from a judgment of the General Term of the City Court of New York, which affirmed a judgment for the defendants rendered upon a verdict in their favor.

Action upon a promissory note by the indorsee against the maker and indorser, the defendants' contention being that the note was given in part renewal of one for a larger amount, which, with earlier renewals thereof, the plaintiff, a private and individual

banker, had discounted for their accommodation at usurious rates; and that because of such usury the plaintiff had incurred a loss of all interest and a forfeiture of double the sum paid for the forbearance of the loan. The amount of such forfeiture was counterclaimed by the defendants.

Frederic J. Swift, for appellant.

Geo. C. De Lacy, for respondents.

BISCHOFF, J. The conclusiveness of the judgment of affirmance in the court below, as to the facts in evidence (Meyers v. Cohn, 4 Misc. Rep. 185), and the state of the record, restrict our authority upon this appeal to a review of the question whether, or not, the forfeiture or penalty urged by the defendants was available to them by way of counterclaim. The trial court ruled that it was, and the jury, consistently with such ruling, found for the defendants in $1,000, such being the amount in difference between the defendants' claim, at double the amount of the usurious interest paid by them, and that of the plaintiff, the principal of the note in suit.

The State Banking Law (Laws 1882, chap. 409, §§ 68, 69) provided as follows:

"§ 68. Every banking association organized and doing business under and by virtue of the laws of this state, and every private and individual banker or bankers doing business in this state, are hereby authorized to take, receive, reserve and charge on every loan or discount made, or upon any note, bill of exchange or other evidence of debt, interest at the rate of six per centum per annum; and such interest may be taken in advance, reckoning the day for which the note, bill or other evidence of debt has to run. The knowingly taking, receiving, reserving or charging a rate of interest greater than aforesaid shall be held and adjudged a forfeiture of the entire interest which the note, bill, or other evidence of debt carries with it, or which has been agreed to be paid thereon; and in case a greater rate of interest has been paid the person or persons paying the same or their legal representatives may recover back twice the amount of the interest thus paid, from the association, or private or individual banker, taking or receiving the same; provided, that such action is commenced within two years from the time the said excess of interest is taken. But the purchase, discount or sale of a *bona fide* bill of exchange, note or other

evidence of debt, payable at another place than the place of such purchase, discount or sale, at not more than the current rate of exchange for sight drafts, or a reasonable charge for collecting the same, in addition to the interest, shall not be considered as taking or receiving a greater rate of interest than six per centum per annum."

" § 69. It is hereby declared that the true intent and meaning of the last preceding section is to place and continue the private and individual bankers and banking associations organized and doing business as aforesaid on an equality, in the particular in said section referred to, with national banks organized under the act of congress, entitled 'An act to provide a national currency, secured by pledge of United States bonds, and to provide for the circulation and redemption thereof,' approved June third, eighteen hundred and sixty-four." These provisions were retained in the revision of 1892 (Laws 1892, chap. 689, § 55), identically as quoted.

Under an act of Congress according a right of action, against national banks, to a party paying interest upon a usurious loan, in phraseology substantially the same as that employed in this statute of our state, the Court of Appeals held that the borrower's demand for the penalty was properly the subject of a counterclaim to the bank's action to recover the money loaned. National Bank v. Lewis, 75 N. Y. 516.

In that case the defendant's right of demand arose solely from the act of Congress, and that act was construed by the Supreme Court of the United States, subsequently to the Court of Appeals decision, as giving no right of an enforcement of the demand by way of counterclaim (Barnet v. Bank, 98 U. S. 555), which construction of the federal statute was conclusive upon the state courts (Hintermister v. First Nat. Bank, 64 N. Y. 212, 214), and was, therefore, adopted by the Court of Appeals upon a reargument of the Lewis case, 81 N. Y. 15.

In the case at bar the defendants' rights as against the plaintiff, a private banker, exist by virtue of a state statute which, unless some contrary legislative intent appears, must be construed in accordance with the views expressed by the Court of Appeals when considering an act similarly framed, their decision being, so far, unrestricted by any more conclusive judicial authority.

As an independent question, the matter is to be determined in favor of the maintenance of the counterclaim, since the Court of Appeals as an independent tribunal has so decided (National Bank

v. Lewis, 75 N. Y. 516), but it is claimed by the appellant that the legislature intended so to regulate the rights and liabilities of private bankers and state banks as to place them, in all particulars, upon an exact equality with national banks, and had to this extent adopted the provisions of the federal law governing national banks, as construed by the Supreme Court of the United States.

The contention proceeds upon the following provision of the State Banking Law, as above quoted: "It is hereby declared that the true intent and meaning of the last preceding section is to place and continue the private and individual bankers * * * on an equality, *in the particulars in said section referred to*, with national banks. * * *"

The "particulars in said section referred to" have to do with the penalty for the taking of usurious interest, and the "equality" sought to be accomplished is obviously a uniformity of the penalty in the case of all banks, national and state, and individual bankers, the inequality being found in the situation whereby, but for this enactment, the national banks, dealing usuriously, forfeited twice the amount of interest received, and the state banks, or individual bankers, in no greater fault, forfeited the entire subject of the loan.

By the law of this state, counterclaims are favored as tending to avoid a multiplicity of actions (Glen, etc., Mfg. Co. v. Hall, 61 N. Y. 226, 237; Carpenter v. Manhattan Ins. Co., 22 Hun, 49), and we are to presume that the legislature had knowledge of this aspect of the matter when omitting any specific restriction against this method of procedure from the act in question.

Failing any provision which should place this statute without the scope of the statute regulating counterclaims (Code Civ. Pro., § 501), as liberally construed, we think that the legislative intent was to equalize the rights of the national and state banks and individual bankers, while not in any way altering the rules of procedure as existing in this state, and, as so existing, the defendants were entitled to maintain their counterclaim in accordance with the decision of the Court of Appeals in Bank v. Lewis.

As stated, this question of the legal enforcibility of the counterclaim is the only one involved by the exceptions upon which reliance is placed by the appellant, and the judgment, accordingly, must be affirmed, with costs.

DALY, P. J., and MCADAM, J., concur.

Judgment affirmed, with costs.

JOHN J. GILROY, Respondent, *v.* THOMAS J. LOFTUS, Impleaded, Appellant.

(Supreme Court, Appellate Term, December, 1897.)

1. Trial — Charge of an abstract proposition — General exception.

Where, upon the trial of an action, the court, while dealing with requests to charge, makes a statement which is correct as an abstract proposition of law, but which, under the circumstances, may have had a tendency to mislead the jury, the defeated party cannot obtain a new trial upon a mere general exception taken to the statement, as it is his duty to go farther and request that the statement be qualified by an instruction limiting the rule to its proper application.

2. Partnership — Evidence.

Testimony given in an action, by which the plaintiff seeks to hold the defendant as a partner in a firm, that when the plaintiff's agent came to him to secure railroad advertising, stating that he (the agent) had seen his (meaning the firm's) advertisement in certain other cars and asking it for those controlled by his principal, the defendant said, "I don't attend to any advertising for the firm; my brother does all that, and you will have to call and see him," tends to show that the defendant at least held himself out as a partner and justifies the court in refusing to charge the jury that the testimony, even if true, is insufficient to charge the defendant with the firm debt.

REARGUMENT of appeal from an affirmance, by the General Term of the City Court of New York, of a judgment entered upon a verdict in favor of plaintiff.

David McClure, for appellant.

Thomas F. Gilroy, Jr., for respondent.

BISCHOFF, J. As noted in the opinion delivered by this court upon the first hearing of the appeal (21 Misc. Rep. 317), the sole issue was of the appellant's partnership, actual or ostensible, with W. C. Loftus, and upon this reargument, limited to certain questions arising under exceptions taken to the trial court's rulings upon requests to charge, the appellant contends that error was committed in two instances.

The first point thus involved has to do with an instruction given at the plaintiff's request, immediately succeeding the charge by the court, that the plaintiff was bound to prove his case by the preponderance of evidence, the record disclosing the matter as follows:

"Plaintiff's counsel.— I ask you to charge that we are not held to as high order of proof in this case in establishing the partnership as we are usually held to in ordinary cases.

"The court.— I so charge.

"Defendant's counsel.— I except."

Taken as an abstract proposition of law, this statement was substantially correct. The partnership, which was sought to be established, was based upon the relation existing between the defendant and another, and the *prima facie* proof required in such a case was not of such a high degree as would be demanded of a plaintiff whose action was founded upon the fact that he himself was a partner, in view of the different nature of evidence generally available in cases so distinguished (McGregor v. Cleveland, 5 Wend. 477), but the rule enunciated was not well applicable to the province of the jury, since it operated merely upon a question of law for the court as to the legal sufficiency of the proof in a particular case, and it may be that it had some tendency to mislead the jury and to induce an attempt to apply this doctrine to their deliberations upon the weight of the evidence. But, granting the possibility that prejudice resulted, still we may not order a new trial, since such a course upon an appeal like the present must be based solely upon some valid exception (Machauer v. Fogel, 21 Misc. Rep. 637), and here the exception was insufficient.

Where a single proposition is charged incorrectly as a statement of law, the noting of a general exception operates to present the error to the court of review (Requa v. Holmes, 16 N. Y. 193), and the excepting party is under no duty to request that the rule, as formulated correctly, be charged (Freund v. Paten, 10 Abb. N. C. 311), unless the error is the result of a mere inadvertence, and so would have been corrected had the court's attention been called to it. Simmons v. Ocean Causeway, 21 App. Div. 36. The general exception, however, challenges merely the correctness of the legal proposition which the charge affirms (Varnum v. Taylor, 10 Bosw. 148), and the instruction under consideration was in effect sound as a rule of law. It was an abstract proposition, but this did not render it the subject of exception (Lyon v. Marshall, 11 Barb. 241; Walrod v. Ball, 9 id. 271), and since the appellant's quarrel was with the

propriety of the statement to the jury, not with its legal correctness, he should have requested that the statement be qualified by an instruction limiting the rule to its proper application. We cannot say that the tendency of this charge was so manifestly to prejudice the jury that the mere exception would naturally have suggested to the court the impropriety with which the appellant was impressed; it is by no means improbable that the jury understood the true application of the rule, and, accordingly, the case was simply one in which two constructions of the charge were possible, with a duty resting upon the excepting party to present the modification necessary to free the matter from ambiguity in order that the exception might be valid if that modification were not adopted (Varnum v. Taylor, *supra;* Springsteed v. Lawson, 14 Abb. 328; 23 How. 302), since the point was not sufficiently obvious to dispense with the necessity of some such action upon the appellant's part. Walsh v. Ins. Co., 32 N. Y. 427, 440.

We pass to a consideration of the second and remaining point raised upon exceptions taken as below:

"Defendant's counsel.— Now, I ask your honor to charge that even assuming that T. J. Loftus made the statement alleged by Mr. Selling, that is not sufficient to justify them in awarding a verdict for the plaintiff in this action.

"The court.— I emphatically decline to charge that, and I charge that if he made that statement and thereby led the plaintiff or the plaintiff's representative to believe that he was a partner of his brother, even though he was not, as a matter of fact, that that would hold him as a partner so far as his liability on this contract is concerned.

"Defendant's counsel.— I except to your refusal to charge in the language of the request, and to your honor's charge just made. Your honor charges that that alone would be enough to warrant a verdict on behalf of the plaintiff?

"The court.— Yes, it would warrant a verdict for the plaintiff.

"Defendant's counsel.— I except."

The contention that this charge was erroneous in that it omitted some of the elements of an estoppel — the party's reliance upon the statement in this particular transaction and that the reliance was reasonable — must be taken as unfounded, since here the appellant was bound to suggest to the court the particular defect in order that what was omitted through apparent inadvertence might be supplied, for a complete statement of the rule in question (Simmons

v. Ocean Causeway, *supra*), and the point that the defendant's words as referred to were not sufficient in law as the basis of an estoppel is also untenable. Upon this matter the evidence was that Selling, the plaintiff's agent for soliciting advertising contracts, called upon the appellant for the purpose of obtaining such a contract as that in suit, and stated to him that he "had seen his advertisement in the Broadway cars" (referring to the advertisement of W. C. Loftus & Co.), "and had called to solicit them for the Third Avenue Railroad." To this the appellant answered, "I don't attend to any advertising for the firm; my brother does all that, and you will have to call and see him." We think that it was permissible to the jury to find that such an answer, made under these circumstances, could have been reasonably construed by an ordinarily prudent person as an admission that the speaker was a member of the firm which was the subject of the conversation, and, therefore, must hold that the court's refusal to charge in the language of the request was not error. That the refusal was made "emphatically," as the appellant complains, does not render erroneous a ruling which, but for the emphasis, was correct. The province of this court upon the present appeal is to determine questions of law solely, and, if the appellant had indeed cause for grievance by reason of the attitude of the trial judge, which we do not concede, the matter was one for the General Term, but does not come within the scope of our review. Hamilton v. Third Ave. R. R. Co., 53 N. Y. 25, 27.

The judgment must be affirmed, with costs, and costs of reargument.

DALY, P. J., and BISCHOFF, J., concur.

Judgment affirmed, with costs, and costs of reargument.

ABRAHAM H. WOLFF, Appellant, *v.* HERMAN RAUSCH, Respondent.

(Supreme Court, Appellate Term, December, 1897.)

Chattel mortgages — Subsequent purchasers — Conversion — Assignment of cause of action.

The provisions of the statute relative to chattel mortgages (Laws of 1895, chap. 354, § 1, amending Laws of 1833, chap. 279, § 3), protecting subsequent purchasers in good faith of mortgaged property, where there has been a failure to refile the mortgage, do not protect

one who purchases on the day before one year from the date of the first filing, as the word "subsequent" means after the date when the mortgage should have been refiled; and hence the assignee of a mortgagee, who has been refused possession by such a purchaser, may maintain an action against him for a conversion.

APPEAL by the plaintiff from a judgment of the justice of the Seventh District Court in favor of the defendant.

Joseph I. Green, for appellant.

Oscar J. Hochstadter, for respondent.

DALY, P. J. The plaintiff sues as the assignee of Julius H. Horwitz, who had a cause of action against the defendant for damages for the conversion of a piano. The piano was mortgaged to Horwitz by the owner, who afterwards, and while the mortgage was in force, transferred the piano to the defendant.

The defendant refused to deliver it on the demand of the mortgagee, and resisted this action on the ground that the mortgage had not been renewed by the filing of a copy within the time prescribed by the statute. The chattel mortgage was made and filed March 9, 1896, and expired for want of renewal on March 9, 1897. The defendant purchased the mortgaged chattel on March 8, 1897, one day before the mortgage expired.

The statute prescribes that every mortgage filed in pursuance of the act, "shall cease to be valid as against the creditors of the person making the same, or against subsequent purchasers or mortgagees in good faith, after the expiration of one year from the filing thereof, unless within thirty days next preceding the expiration of each and every term of one year after the filing of such mortgage a statement describing such mortgage, stating the names of the parties, the time when and the place where filed, and exhibiting the interest of the mortgagee in the property thereby claimed by him by virtue thereof, shall be again filed in the office of the clerk or register aforesaid of the town or city where the mortgagor shall then reside, if he is then a resident of the town or city where the mortgage or a copy thereof was last filed." Laws of 1895, chap. 354.

The contention of the defendant is that the term "subsequent purchasers," in the statute, embraces one who purchases the mortgaged property at any time after filing of the mortgage, and before

the expiration of a year from the filing; and that as to such persons the mortgage ceases to be a valid lien after the expiration of the year, if not renewed by refiling. A different construction has been placed upon a like provision in the former statute, and the term "subsequent" was held to mean after the time when the mortgage is to be refiled; so that a mortgage executed and filed in November, 1846, but never refiled, was held valid as against a mortgage executed in January, 1847, and refiled annually till 1850, the chattels in the meantime remaining in the mortgagor's possession. Meech v. Patchin, 14 N. Y. 71.

The case before us is like the one cited and the language of the court is applicable here. When the defendant took his bill of sale the Horwitz mortgage was on file, and he accordingly had the notice of it which the statute contemplated. The year from the time it was filed had not elapsed, and no fault, or want of diligence, had, therefore, happened on the part of the mortgagee, whose mortgage was in full vigor and the bill of sale was taken subject to it.

Their respective rights had become fixed, and the want of diligence of the mortgagee by refiling was of no importance as against the defendant. (Same case, pp. 73-74.)

As to one who purchases before the expiration of the year from the first filing of the mortgage, no refiling is necessary; the term "subsequent," in the provision that the mortgage shall cease to be valid as against subsequent purchasers and mortgagees in good faith, means subsequent to the expiration of the year; that is, after the time for refiling has elapsed. Dillingham v. Bolt, 37 N. Y. 198. The judgment, therefore, that the mortgage of the plaintiff's assignee had ceased to be a valid lien against the defendant, who purchased the chattel before the expiration of a year from the time of filing the mortgage, because it was not renewed by refiling, cannot be sustained. The point is taken by the appellant that the cause of action for damages for conversion is not assignable, but no authority is cited for the proposition. The Code, section 1910, permits the assignment of any claim, or demand, except such as are specified, and a claim for conversion is not among the exceptions.

Judgment should be reversed and a new trial ordered, with costs to appellant to abide event.

McAdam and Bischoff, JJ., concur.

Judgment reversed and new trial ordered, with costs to appellant to abide event.

CAECILIA FEDER, Appellant, *v.* HARRY W. SAMSON, Respondent.

(Supreme Court, Appellate Term, December, 1897.)

District Courts — Answer — Insufficient denial.

Where the plaintiff serves a verified written complaint, in an action on contract brought in a District Court of the city of New York, the defendant must serve a verified answer; and where such an answer, interposed to one of the causes of action, merely states that the defendant, by his attorneys, "alleges and respectfully shows" that certain allegations of the complaint "are denied," it is ineffectual for any purpose, and the plaintiff is, in the absence of any amendment being allowed upon the trial, entitled to judgment upon that cause of action. The plaintiff is not bound in such a case to move to make the answer more definite and certain.

APPEAL by the plaintiff from a judgment of the justice of the Seventh District Court in favor of the defendant.

M. A. Lesser, for appellant.

Weill & Mayer, for respondent.

DALY, P. J. In an action upon contract, express or implied, in a District Court, the plaintiff may serve with the summons a copy of a written complaint verified in like manner as a verified pleading in the Supreme Court (Consolidation Act, § 1346); and where that is done, if the defendant fails to appear and answer by filing a written answer, verified in like manner, denying one or more material allegations, or generally each allegation of the complaint, or setting forth new matter constituting one or more defenses or counterclaims, the justice must render judgment in favor of the plaintiff. (Id., § 1383.) The answer may contain a general denial of each allegation of the complaint, or a specific denial of one or more of the material allegations thereof. It may also set forth in a plain and direct manner new matter constituting one or more defenses or counterclaims. (Code, § 2938, made applicable by section 1347, Consolidation Act.) A pleading is not required to be in any particular form, but it must be so expressed as to enable a person of common understanding to know what is intended. (Code, § 2940; Consolidation Act, § 1347.)

The plaintiff in this case, having served a written complaint, verified, the defendant was required to put in a verified written answer; and such answer, if intended to put in issue any allegation of the complaint by a denial thereof, should contain a denial under oath, for such was the evident intention of the legislature in requiring a verified pleading. In this case the answer stated that the defendant, by his attorneys, "alleges and respectfully shows" that certain allegations of the complaint "are denied." A verification of such an answer, that it is true, affirms nothing with respect to the truth of the denial.

The plaintiff is entitled to a direct denial by the defendant, either general or specific, of the averments of the complaint. The answer here does not commit the defendant to any such denial. If prosecuted for perjury on the ground that the complaint was true and he knew it, he might argue that he never swore it was not true, but only swore that he "alleged that it was denied," and offer to show that it had been denied by some one, no matter whom, which would be sufficient to bring him within the terms of his oath and so permit his escape from the charge. Plaintiffs would be deprived of all the advantages intended to be secured to them by the statutory requirement, if an oath to their adversaries' denials could be avoided by the adoption of some such formula of words as was adopted by this defendant.

As the answer contained no denial of the plaintiffs' first cause of action she was entitled to judgment upon it, unless the defendant was permitted to amend on the trial under the power conferred upon the justice. (Code, § 2944, made applicable to District Courts by § 1347, Consolidation Act.) The plaintiff was not bound to move to make the answer more definite and certain. (Clark v. Dillon, 97 N. Y. 370-374.)

For the error in denying the plaintiff's motion for judgment on the first cause of action, the judgment must be reversed and a new trial ordered. It is proper to say, with respect to other rulings of the justice which may be the subject of exception upon the new trial, that the exclusion of evidence that defendant made no sales, or purchases, of stocks, and that his transactions were fictitious, was proper; for the complaint expressly alleges purchases and sales and holding of stock. There was no allegation that the transactions were fictitious, and so the evidence offered was not within any issue presented by the pleadings.

Judgment reversed and a new trial ordered, with costs to appellant to abide event.

McAdam and Bischoff, JJ., concur.

Judgment reversed and new trial ordered, with costs to appellant to abide event.

Herbert Van Dyke, Respondent, *v.* John M. Gardner, Appellant.

(Supreme Court, Appellate Term, December, 1897.)

1. **Assignment of a bond, mortgage and guaranty of collection — Right of assignee to enforce an agreement, contained in the guaranty, that the guarantor would take a reassignment.**

   Where a bond and mortgage and a guaranty of payment and collection, executed to the holder by one who had sold the bond and mortgage to her, and who, in the instrument of guaranty, had agreed to take a reassignment of them at the amount due and upon demand made, are, after default by the guarantor both upon the promise to pay and also upon that to take a reassignment, duly assigned by the owner and holder under a written instrument which, after assigning the bond and mortgage, also assigns a "written guaranty of payment and collection," it will be deemed to have been the intention of the parties that all rights under the whole instrument of guaranty should pass to the assignee, and he, therefore, may enforce, against the guarantor, the cause of action created by the breach of his promise to take a reassignment of the bond and mortgage.

2. **Assignment — Cross-examination of assignee as to his ownership.**

   Where the plaintiff proves a valid assignment to himself of a cause of action, it is not erroneous to deny the defendant the right to cross-examine the plaintiff as to his ownership.

3. **Appeal — Error cured.**

   Error in excluding evidence is cured by its subsequent admission.

Appeal by the defendant from a judgment entered upon the verdict of a jury in favor of plaintiff for $1,337.75 and costs.

T. F. Hamilton and Henry M. Heymann, for appellant.

George Bell, for respondent.

DALY, P. J. The defendant, a lawyer, was sued by the assignee of his client Emma D. Wadsworth, upon his agreement in writing made March 1, 1894, to take from her a reassignment of a bond and mortgage which he had previously sold to her for $1,150, the amount due thereon, and to pay her upon such reassignment, at any time after April 1, 1895, the amount due upon the bond and mortgage, if notified not later than February 1, 1895.

The complaint alleged notice from the assignor to defendant in December, 1894; demand by her of payment immediately after April 1, 1895, of the sum of $1,150, being the amount due on the bond and mortgage; the refusal of defendant to take the reassignment and pay the said sum; and the assignment by her to plaintiff of the demand and claim by reason thereof, and of the bond and mortgage. The defense was a denial of the amount due on the bond and mortgage, of the assignment to the plaintiff and that any sum was owing from defendant to plaintiff, and an affirmative defense alleging neglect of plaintiff's assignor, after request, to foreclose and collect the mortgage from the property covered by it, which the owners had suffered to become dilapidated and depreciated in value below the amount of the plaintiff's mortgage and prior incumbrances.

The trial of the action resulted in a verdict in favor of the plaintiff for the full amount claimed and interest, which was affirmed by the General Term of the City Court, and this appeal is taken in reliance upon certain exceptions taken at the trial: (1) To the exclusion of questions as to payments upon account of the bond and mortgage and refusal to allow the jury to credit defendant with such payments; (2) The exclusion of proof tending to show that the plaintiff was not the owner of the bond and mortgage; (3) To the denial of the motions to dismiss the complaint on various grounds, among them, " that there is no evidence in the case showing that the plaintiff has transferred to him by Emma Duke Wadsworth or is the owner of the claim for damages by reason of the defendant's breach of the obligation to take a reassignment of the same."

The plaintiff proved an assignment in writing from Emma D. Wadsworth, party of the first part, to him, as party of the second part, of the bond and mortgage mentioned in defendant's agreement " with a written guaranty of payment and collection of said John M. Gardner duly delivered to me and by me transferred to the party of the second part hereto; " and produced and proved on the trial the said written guaranty, which was as follows:

"I do hereby guarantee the payment and collection of the within bond and mortgage, on which there is now due $1,150 and interest from March 1, 1894. I do hereby agree to take a reassignment from said Emma Duke Wadsworth of the same and pay the amount due thereupon at any time after the 1st day of April, 1895, if she so elects and so notifies me not later than February 1, 1895.

"March 21, 1894.

"JOHN M. GARDNER."

The instrument thus described in the assignment as "a written guaranty" contained the agreement for a reassignment and the whole instrument passed under such description. The words of description cannot be construed as limiting the transfer to so much only of the instrument as guaranteed the mortgage, no such intention being apparent from the context or from any evidence in the case, and it was, therefore, to be inferred that the whole instrument was intended to pass. This is indicated by the words "duly delivered to me and by me transferred to the party of the second part." The assignment of the bond and mortgage carried with it the guaranty of payment or collection, even if such guaranty had not been mentioned in the assignment. Stillman v. Northrup, 109 N. Y. 473; Craig v. Parkis, 40 id. 181. As it would be superfluous, therefore, in the assignment to make a particular mention of the guaranty, such mention cannot be reasonably limited in effect as an assignment of the guaranty alone, for that passes with an assignment of the bond and mortgage. We must regard, therefore, the mention of the instrument in the assignment as referring to the agreement to take a reassignment, which would not pass by a transfer of the bond and mortgage unless specifically mentioned. We must hold, consequently, that the assignment to the plaintiff relates not only to the defendant's agreement to take a reassignment, but to that exclusively.

This assignment of the agreement vested in the assignee the cause of action of the assignor for the breach of it, since there was no other right which could be conveyed by the assignment, the right of the assignor being exhausted by her notice and demand within the time limited by the agreement and there surviving to be assigned nothing but her demand growing out of defendant's refusal to comply with such demand. Her intention, therefore, to transfer that demand is to be inferred from her assignment of the agreement which, except as a claim for damages for the prior breach,

had no further vitality. It was her only interest in the agreement and the whole interest of the assignor in the thing assigned passes by a complete assignment to the assignee. 2 Am. & Eng. Ency. of Law [2d ed.], 1804. It was not the case of a continuing contract, the assignment of which does not transfer a right of action for a previous breach. 18 Mo. App. 196; 26 Iowa, 575.

The denial to the defendant of the right to cross-examine plaintiff as to his ownership of the bond and mortgage was not error. The plaintiff had proved an assignment to himself from the owner and thus had established the facts of assignment and ownership set out in the complaint and denied by the answer. A valid assignment having been established, the defendant had no legal interest to inquire further. Sheridan v. Mayor, 68 N. Y. 30; Greenwood v. Marvin, 111 id. 440. If the defendant had notice of a transfer by plaintiff of his interest to any other person before the commencement of his action, he should have set up the defense that plaintiff was not the real party in interest and pleaded the facts to establish it.

The only remaining exceptions by defendant that require to be noticed are those with respect to rulings upon the subject of alleged payments by defendant upon account of the bond and mortgage of which he was to take the reassignment. He claimed the right to show such payments under his denial that the sum claimed by plaintiff and his assignor remained due thereon at the time of the notice and demand by the latter upon him. But, while the trial judge sustained in the first instance an objection to the question put to defendant: "How much money have you paid on account of this bond and mortgage?" it appears from the record that defendant was subsequently allowed to go fully into the matter and to state all he had to say on the subject; from which it conclusively appeared that he had made no payments on account of these instruments. He at one time claimed to have made a payment of $300 thereon, but it was shown that the only advance of that amount by him to his client, for which a voucher was produced in form of a note dated November 10, 1894, was a loan on the security of another mortgage (for $1,000) he had sold to her. He then testified that he had given her $300 at another date, May, 1895, but as to that he expressly stated it was applied on the same $1,000 mortgage; and he further testified that, when at that time the plaintiff's assignor asked him if he was in a position to let her have the money on the $1,150 mortgage, he told her that the

mortgage was good, but that she had not notified him that she wanted the money; that notice was necessary under the agreement; that he was responsible under his guaranty, but that if she did not proceed to foreclose she would lose her rights against him as guarantor. He further showed beyond question that, instead of paying anything on account of the mortgage, he repudiated any liability under the agreement to take a reassignment when the money was demanded by the assignor, and also when it was demanded by the assignee; putting his repudiation squarely on the ground that notice had not been given him within the time limited by the agreement. The ruling of the trial judge, therefore, worked no injury, and the subsequent refusal to submit the question of payment to the jury was proper, since it appeared that no payment had been made. Judgment affirmed, with costs.

McAdam and Bischoff, JJ., concur.

Judgment affirmed, with costs.

Henry B. Fischer et al., Appellants, *v.* Jacques Cohen et al., Respondents.

(Supreme Court, Appellate Term, December, 1897.)

1. **Replevin — Conditional sale — Form of judgment for plaintiff.**

Where a piano is sold upon a condition precedent of full payment, the vendor may maintain replevin against one who purchased it in good faith at an auction sale; and as the vendor is entitled to possession, the judgment must award it to him in the form prescribed by section 730 of the Code of Civil Procedure (made applicable to District Courts of the city of New York by Laws of 1882, chap. 410, § 1343); and a judgment by which the justice of such a court directs that if the defendant shall pay into the court the amount still due and unpaid upon the piano, together with certain costs, he shall have judgment for its return, without costs, is wholly unauthorized.

2. **Same — When the verdict need not fix the value of the chattel.**

There is no statutory provision which requires the verdict, in an action of replevin, to fix the value of the chattel where the verdict awards possession of the chattel to the person to whom it has been delivered by the officer.

APPEAL by plaintiffs from judgment of the Eleventh District Court.

Thomas F. Byrne, for appellants.

M. Esberg and A. C. Anderson, for respondents.

MCADAM, J. The action was in form for replevin to recover the possession of a piano alleged to belong to the plaintiffs, of the value of $200. The piano was delivered to the defendant Belle Stanley, February 29, 1892, under a conditional sale agreement reciting that the vendee had given in exchange a Stoddart piano, at $75, and paid $10 on signing the agreement, and providing that if she paid $25 on the 1st day of May, 1892, and $10 a month on the first day of every month thereafter, until the payment of the purchase price, $400, the agreed value of the instrument, the plaintiffs would deliver to her a bill of sale thereof. The vendee paid in all, $383, leaving $17 of the agreed $400 unpaid.

The contract also contained a provision that in case default was made in any of the payments or conditions the plaintiffs might resume possession of the piano and hold it until payment of the full price thereof. The agreement was executed in duplicate; and one was delivered to the vendee, which obviated filing in order to give constructive notice. Laws 1888, chap. 225.

Stanley, the vendee, could not be found by the plaintiffs, and was not, therefore, served with process. The piano was found in the possession of the defendant Cohen, who had purchased it in good faith at an auction sale for $81, and the action proceeded against him. The instrument was taken from Cohen by the marshal, under the replevin writ, and for want of a counter bond was delivered to the plaintiffs, in whose possession it now is.

The plaintiffs, under their contract, were entitled, even as against the defendant Cohen, to resume possession of the piano and to hold it until the balance of the purchase price was paid, and were consequently entitled to judgment awarding such possession to them. Upon possession being awarded to the plaintiffs, the defendant Cohen may in any manner he deems advisable litigate with them the question whether he is the successor in interest of the conditional sale vendee under the statute (Laws 1888, chap. 225), and have determined in such litigation any right to subrogation or redemption he may have. It is sufficient to say that these questions

are not before us for decision now. Replevin is a possessory action, and the issue to be determined by it is the right of the parties litigant to possession of the subject-matter at the time the action was commenced.

Instead of rendering judgment in favor of the plaintiffs, the justice in his return says: "The case here closed, and I thereupon, to-wit: on the 11th day of August, 1897, rendered judgment as follows: Upon deposit by defendant Cohen in court of $17, together with $5.50 costs, for the benefit of the plaintiffs, there will be judgment for the defendant for the return of the piano, without costs."

The justice must have determined from the evidence, before he could have awarded the plaintiffs costs, that they were entitled to the possession of the piano; but instead of awarding them a judgment therefor, he did what he evidently regarded as tantamount to it. The difficulty with his equitable disposition of the controversy is that it finds no warrant in the law.

The judgment should have been in the form prescribed by section 1730 of the Code (made applicable to District Courts by the Consolidation Act, § 1343), which provides that "Final judgment for the plaintiff must award to him possession of the chattel recovered by him, with his damages, if any." An execution on such a judgment is specially provided for. Code, § 1731, made applicable to District Courts by § 1343 of the Consolidation Act. But no execution could issue on the provisional judgment rendered by the justice, because not in harmony with statutory requirements.

It is claimed by the respondent Cohen that the justice properly fixed the value of the plaintiffs' special property as against him, he having become the general owner, and Allen v. Judson, 71 N. Y. 77; Townsend v. Bargy, 57 id. 665, and Fowler v. Haynes, 91 id. 346, are cited in support of the contention. An examination of those cases will show that the special owners prevailed as to the right of possession; and the property being in the custody of the general owners, it was held that as against them the sum to be paid in the event of failure to obtain possession of the property was only the value of the special ownership therein. But here the property was in the actual possession of the prevailing parties, and the judgment, when put in legal form, leaves it there undisturbed. They did not ask to recover anything in addition to the possession, except costs. The question of value was, therefore, quite immaterial.

There is no provision in the Code requiring the verdict in an action of replevin to fix the value of the chattel where it awards

possession thereof to the person to whom it has been delivered by the officer. Code, § 1726; Claflin v. Davidson, 8 Civ. Pro. 46.

As we have power to "reverse, affirm or modify the judgment appealed from" (Code, § 3213), it must be modified by making it conform to statutory requirements; that is to say, there must be "judgment for the plaintiffs for the possession of the chattel recovered by them, with $5.50 costs." See Fitzhugh v. Wiman, 9 N. Y. 559, 565; First Nat. Bk. v. Kelly, 57 id. at p. 34; Goldstein v. Greenberg, 18 Misc. Rep. 61.

Judgment modified accordingly, without costs.

DALY, P. J., and BISCHOFF, J., concur.

Judgment modified in accordance with opinion, without costs.

THE EMERALD & PHOENIX BREWING CO., Appellant, v. MICHAEL LEONARD, Respondent.

(Supreme Court, Appellate Term, December, 1897.)

1. **Bailment for an indefinite term — Termination — Notice to bailor.**

A bailment for storage, for an indefinite time, is terminable at the will of either party; and where the bailee notifies the bailor that he refuses to continue longer as bailee and gives the bailor an opportunity to obtain the subject of the bailment, the bailee is released.

2. **Same — Waiver of tort in selling the thing stored.**

Where the bailor brings an action against the bailee as for goods sold and delivered, he waives the alleged tortious act of the bailee in selling to another the subject of the bailment, and cannot maintain therefor an action for a conversion.

3. **Evidence — Parol, to show that a bill of sale did not include the thing stored.**

The rule that parol evidence is inadmissible to contradict or vary a written contract applies only to controversies between the immediate parties to the instrument, and does not preclude a bailee from showing, as against the bailor, that a bill of sale, by which he sold to a third party his business at the place of the bailment, "together with all the goods, chattels, stock in trade," etc., did not include the property which he held as bailee.

4. Same — Ambiguity.

Where the description of property, as contained in a written instrument, is ambiguous, parol evidence is admissible to ascertain the nature and quality of the subject-matter to which the instrument refers.

APPEAL by plaintiff from judgment of the Eighth District Court in favor of defendant.

Isaac N. Miller, for appellant.

James F. Higgins, for respondent.

MCADAM, J. On March 12, 1895, the plaintiff placed on storage in the cellar of defendant's liquor store, No. 2641 Eighth avenue, ten casks of old stock ale, on the understanding that the defendant might, if he desired, use the ale in his business upon paying $17 net, as each cask was used. The defendant, under this arrangement, used two casks of the ale, which he paid for on November 29, 1895, when he sold the business to John McCabe.

The defendant testified that he did not sell the eight casks of stock ale in the cellar; that he told his vendee the ale belonged to the plaintiff, and was there on storage only; and that his vendee agreed to arrange with the plaintiff concerning it. He further testified that when he sold the place, he went to the plaintiff, and after paying for the two casks which he had used, notified the plaintiff of the sale, and that the plaintiff must either take the old ale out of the cellar or make arrangements with McCabe concerning it. There can be no doubt that this notice was given, for the plaintiff's salesman, Mr. Theiss, testified that when the defendant settled for the two casks of ale, "he said he had sold out to McCabe, that for us to take out the stock ale or collect from McCabe."

The storage was not for any definite time, and was, therefore, terminable at the will of either party. In such case, "the bailment may be terminated by the act of the bailee. He may refuse to continue the relation longer, when, after notifying the bailor to that effect and giving him an opportunity of getting the thing back, he will stand released." Lawson's R. & R., § 1712; Roulston v. McClelland, 2 E. D. Smith, 60; Dale v. Brinckerhoff, 7 Daly, 45. The bailment was, therefore, effectually terminated by the notice given.

The plaintiff bases its right to recover upon the ground that the defendant made a sale of the eight casks of ale to McCabe, and by the exercise of this dominion converted the same to his own use; but it waived the alleged tort and sued upon contract as for goods sold and delivered. See Terry v. Munger, 121 N. Y. 161; 26 Am. & Eng. Ency. of L. 792; 3 Wait's Act. & Def. 529; 4 id. 475; 6 id. 214; 7 id. 484; Moak's Underhill on Torts, 607; McGoldrick v. Willits, 52 N. Y. 612; Abbott v. Blossom, 66 Barb. 353. The plaintiff's contention fails, however, in view of the finding that the defendant did not sell the ale to McCabe.

The plaintiff goes a step further, and insists that the defendant allowed McCabe to assume control of the property, and that McCabe's refusal to give it up to the plaintiff is equivalent to a denial by the defendant of the plaintiff's right to possession. As the finding of the justice proceeds on the ground that the ale was never in McCabe's possession, except as a temporary caretaker, upon the understanding that the property belonged to the plaintiff, and that he must arrange with it if he desired to use the ale, this claim also fails, in view of the fact that the defendant terminated his relation to the plaintiff as bailee by giving the bailor due notice.

The defendant at all times disclaimed any ownership or right of dominion over the ale, and seems to have conceded all through that the plaintiff was entitled to the property and ought to take it away from the store. It is difficult, therefore, to discover any legal ground upon which he can be held for McCabe's refusal to surrender the property to the plaintiff.

The plaintiff to establish his cause of action offered in evidence the bill of sale from the defendant to McCabe, transferring "the good will of the business carried on, * * * in premises No. 2641 Eighth avenue, in the city of New York, together with all the goods, chattels, stock in trade," etc. Under objection and exception by the plaintiff, the defendant was permitted to testify that at the time of the sale he told McCabe that the ale did not belong to him, but to the plaintiff, and that McCabe said he would make arrangements with the plaintiff concerning it. This ruling is assigned as error.

The evidence was clearly admissible. In Lee v. Adsit, 37 N. Y. 78, it is said that "the rule that parol extrinsic evidence shall not be received to contradict or vary a contract which is in writing, applies only in controversies between the parties, promisor and promisee, in such contract," and that "the writing is not conclusive as be-

tween one of the contracting parties and a third person." And in McMaster v. Insurance Co. of North America, 55 N. Y. 222, it was held that "The rule that parol testimony may not be given to contradict a written contract, is applied only in suits between the parties to it or their privies. * * * It does not apply to third persons, who are not precluded from proving the truth, however contradictory to the written statements of others. Strangers to the instrument, not having come into this agreement, are not bound by it, and may show that it does not disclose the very truth of the matter. And as, in a contention between a party to an instrument and a stranger to it, the stranger may give testimony by parol differing from the contents of the instrument, so the party to it is not to be at a disadvantage with his opponent, and he, too, in such case, may give the same kind of testimony." See, also, Lowell Co. v. Safeguard F. Ins. Co., 88 N. Y. 591; Juilliard v. Chaffee, 92 id. 529, 534; Hankinson v. Van Tine, 152 id. 20, 31; Barreda v. Silsbee, 21 How. (U. S.) 146, 170; Greenleaf on Ev., § 279.

Another rule under which the evidence might perhaps have been admitted is that where the description is ambiguous, it may be made intelligible by evidence *aliunde*, for parol evidence is always admissible to ascertain the nature and qualities of the subject-matter to which the instrument refers. Doe v. Bart, 1 T. R. 704; Cary v. Thompson, 1 Daly, 35; Thomas v. Truscott, 53 Barb. at p. 204.

The instrument not being between the parties to the record, the facts of the transaction were open to the fullest investigation, and on the finding of the justice showed that there was no cause of action against the defendant.

The judgment resolves all controverted questions of fact in favor of the defendant, and the weight of evidence will not be reviewed except in a case of clear injustice. Hardegg v. Williards, 12 Misc. Rep. 17; Huller v. Wynne, 16 id. 580; Burnham v. Butler, 31 N. Y. 480; Halsey v. Hart, 85 Hun, 46.

The judgment is sufficiently sustained by the evidence, and must be affirmed, with costs.

DALY, P. J., and BISCHOFF, J., concur.

Judgment affirmed, with costs.

THE EQUITABLE GENERAL PROVIDING CO., Respondent, *v.* CHARLES EDWARD POTTER, Appellant.

(Supreme Court, Appellate Term, December, 1897.)

Conditional sale — Rent for use — Effect of retaking by vendor.

Proof, made in an action brought for a balance of rent alleged to be due by the vendee upon a conditional sale of two bicycles, that the duplicate agreement, executed in each case, states that the vendee had rented the bicycles from the vendor for the term of ten months, "for the use and depreciation of which" the vendee agreed to pay $105, within ten months at periods fixed; that, upon a failure to pay, the vendee would return the bicycles or, in the alternative, that the vendor might lawfully take possession of them and that, upon full payment, the vendor would execute to the vendee a bill of sale, accompanied by proof that the vendee had the use of the bicycles for sixteen months, when the vendor, before action brought, retook and accepted them and that it now holds them subject to the statutory right of the vendee to redeem from a conditional sale, entitles the vendor to maintain the action.

APPEAL by defendant from judgment of the First District Court.

J. M. Fisk, for appellant.

L. L. G. Benedict, for respondent.

MCADAM, J. The two bicycles which are the subject of this controversy were received from the plaintiff under agreements dated May 6, 1896.

There were two separate writings as to each bicycle; one signed by the plaintiff, the other by the defendant. In each of the two signed by the defendant and delivered to the plaintiff, the defendant certifies that he has rented from the plaintiff one Victor bicycle, to hold for the term of ten months, for the use and depreciation of which he agrees to pay $105, as follows: $5 cash, and $10 on the sixth day of each month. Each of such agreements then provides that in case of failure to pay as above specified, the defendant will, at the option of and upon request from the plaintiff, return the property to it; and upon failure so to do, the plaintiff is authorized to take possession of the bicycle, without being liable

to any damages arising from the taking. In each of the two writings signed by the plaintiff and delivered to the defendant, it agrees that upon receiving the full sum of $105 mentioned, it will execute and deliver to him a bill of sale of the property.

The writing signed by the plaintiff and the one signed by the defendant having been made contemporaneously, and relating to the same subject-matter, are to be read as one instrument. Rogers v. Smith, 47 N. Y. 324, 327; Mott v. Richtmyer, 57 id. 49, 64; Marsh v. Dodge, 66 id. 533, 537. The parties concede that such is the proper rule, and that the agreement was one of conditional sale, the title of the defendant to become complete on payment of the $105 at the time and in the manner specified.

The defendant did not pay the full sum of $105 on each contract as promised, but only $65, leaving $40 unpaid on each bicycle. The last installment he paid was on November 7, 1896. The bicycles were delivered up by the defendant August 15, 1897, on an order from the plaintiff, and it has since had possession of them. It will be seen that the defendant had the use of the property for a little over fifteen months.

The action was brought September 10, 1897, to recover $80, the unpaid rent. The defense is that the plaintiff, by accepting a return of the bicycles before suit is brought, disabled itself from claiming the balance due, and we have been referred to Earle v. Robinson, 91 Hun, 363; 36 N. Y. Supp. 178, as an authority sustaining this contention.

In that case, the vendors in a conditional sale took possession of their property because of a default in payment of certain installments of the purchase price due by the vendee, and thereafter sold the property to other parties. The court held that, in consequence of such taking and subsequent sale, the consideration for notes given on the purchase by the original vendee failed; that as the vendors retained title, they could not have an equitable lien on their own property, and the taking by them could not be justified on any ground other than that of absolute ownership. That case is distinguishable from this in that the entire rent recovered herein was actually earned and payable before the bicycles were returned or suit brought. The plaintiff, when it accepted a return of the property, had an existing right of action against the defendant for the sum sued for, which the return of the property did not discharge, as the defendant was to pay the amount unconditionally, whether he took a bill of sale or not. The bicycles were to remain

the property of the plaintiff until paid for, and their possession was a mere security for such payment, not inconsistent with the right to enforce the promise to pay according to the agreement. Brewer v. Ford, 54 Hun, 116; 59 id. 17; affirmed, 126 N. Y. 643.

In Earle v. Robinson, *supra*, the vendors, by making an absolute sale to a third person, put it out of their power to complete their contract with the conditional sale vendee. In this instance, the property is held by the plaintiff, according to the evidence of its manager, subject to the defendant's order on payment of the balance due. The plaintiff evidently recognizes the defendant's right to redeem provided by the statute relating to conditional sales. Laws 1895, chap. 925.

The defendant agreed to pay a stipulated sum for the "use and depreciation" of the property. He has enjoyed the consideration to the full extent of the contract, and he ought to pay according to its provisions. *Modus et conventio vincunt legem.*

The judgment rendered does even and exact justice between the parties, and gives effect to their clear intention as manifested by their writings, for its effect is to give the plaintiff the contract price, and on payment thereof the defendant the bicycles.

If any apparent complication has arisen it is owing to the default of the defendant, and of this he has no right to complain.

The judgment must be affirmed, with costs.

DALY, P. J., and BISCHOFF, J., concur.

Judgment affirmed, with costs.

FRANKLIN BIEN, as Receiver of the Casino Company, Petitioner, Appellant, *v.* ROBERT F. BIXBY, Individually, and as Trustee, etc., Landlord, Appellant.

(Supreme Court, Appellate Term, December, 1897.)

1. Landlord and tenant — Redemption by tenant under a lease having an unexpired term of five years — Allowances to landlord for fire proofing, change into a theatre, use of new furniture, insurance, legal expenses, custodians — Rent — Commissions.

Where it appears, in a proceeding taken by the receiver of the assignee of the lessee of property used as a concert hall, and belonging to the tenant, in order to redeem, under section 2256 of the Code of

Civil Procedure, from a dispossession under a lease having an unexpired term of five years, that the landlord has, by the terms of the lease, a right to buy the building at a sum not exceeding $50,000, he should be allowed, as against the receiver, for an expense, incurred during the period of dispossession, in making the building fire-proof, under the order of the city department of buildings and for modelling it into a theatre, where it appears that the change was provident, was made at a reasonable cost and that the tenant was credited with the rent; he may also be allowed for the rental value of reasonable refurnishing, where that was made necessary by the removal by the tenant, upon dispossession, of the fixtures in the concert hall; nor should the landlord be charged with a reduction of the rent, below that secured by the former lease, where the sum obtained from the new tenant was the reasonable value of the use of the theatre. The landlord should not be charged, as against the receiver, with rent for the period during which the alterations were made; he is entitled to recover the amount paid for insurance upon the fair value of the premises during the period of dispossession; that paid for legal expenses incurred in dispossessing the tenant and for the wages of a gasman, electrician and janitor, employed as custodians for the period during which the marshal was engaged in executing the warrant of dispossession; but he can be allowed no commissions upon the rent which he collected of the tenant of the theatre during the period of dispossession.

2. **Lease — A tender fixes the expiration of an existing lease.**

The day when a tender, under section 2256 of the Code of Civil Procedure, was made by the receiver, as tenant out of possession, fixes the time when an existing lease to a new tenant, who has entered during the period of dispossession, shall expire; and where the tender complies with the terms of the final order, the receiver is entitled to immediate possession.

Bien v. Bixby, 18 Misc. Rep. 415, modified and affirmed.

APPEAL from final order made by the justice of the Eighth Judicial District Court, upon a proceeding instituted in behalf of the tenant for redemption of the lease and repossession of the premises, after final order in favor of the landlord, and execution of warrant dispossessing the tenant in summary proceedings.

Samuel Untermyer, Moses Weinman and Franklin Bien, for petitioner-appellant.

Samson Lachman and George Freifeld, for landlord-appellant.

BISCHOFF, J. Both parties to the proceeding appeal from the final order made by the justice, fixing the sum which should be paid by the tenant-petitioner to the landlord, as a condition to repossession, each party claiming that too much has been credited to the other and too little to himself in certain instances, the petitioner's most strenuous objection being taken to the allowance to the landlord of sums expended by the latter in rendering the building fire proof, at the direction of the department of buildings, and in remodelling the building for use as a theatre, instead of as a concert hall, in which condition it had been left by the tenant when dispossessed.

The merits of the case were considered at some length in the opinion delivered upon the last appeal to this court (Bien v. Bixby, 18 Misc. Rep. 415), and the justice below has followed, in general, the principles applicable to the matter, so far as were there outlined.

We have held that, while the petitioner's tender to the landlord of the amount of rent actually due, together with the costs and charges of the summary proceedings, was sufficient as forming the statutory basis of these redemption proceedings (Code Civ. Pro., § 2256), the final adjustment of the amount to be paid was not dependent upon the claim for rent, but was to proceed upon general principles of equity, and any construction of our former opinion, whereby the petitioner contends that the adjustment was held to be strictly limited by the covenants of the lease, must result from a misconception of what was decided. Rights of the parties, founded upon circumstances arising during the period when the premises were placed in the landlord's custody, intermediate the tenant's dispossession and his petition for repossession, are not, in their nature, to be measured by the lease, which purports only to express the agreement governing the tenancy, and which cannot be construed as looking toward the tenant's summary removal and happenings attendant upon it. The execution of the warrant in summary proceedings brought the agreement to an end, and, when dealing with the premises thereafter, the landlord could certainly not be bound to follow the strict terms of that agreement at the peril that the tenant, electing to redeem the lease, should be entitled to the benefit of all expenditures, not covered by the instrument, which the landlord found it necessary or expedient to undergo. Were the contrary held, the result would be to place the landlord at the mercy of the dispossessed tenant, since he would be

forced to the alternative of receiving an inadequate rental for his failure to place the building in a desirable condition, or of making alterations which would inure wholly to the benefit of the former tenant should he elect to redeem, which election would probably be induced by the enhanced value of the building and yet might well be unavailed of had the landlord failed to make the improvements, trusting to the chance that there would be a redemption and the subsequent receipt of the rent reserved by the lease. If this were the situation, the order to be made by the trial court would certainly not be such "as justice requires" (Code Civ. Pro., § 2259), and we have no hesitation in holding that the petitioner's contention does not accord with the intention of the legislature. Therefore, although there may not have been charges of which the payment was expressly assumed by the tenant, under the precise terms of the lease, the landlord may still be allowed the items of expense undergone by him in compliance with the orders of the building department, and in making alterations which were essential to the successful management of the property if, upon general principles of justice and equity, the tenant should be charged with the expense, and it accordingly becomes expedient to consider the situation of the parties existing by virtue of the lease, the dispossess proceedings and the tenant's proposal to redeem.

The landlord owned the ground, and the tenant the building, the lease of the ground having been made for a term of ten years, with an agreement by the landlord to purchase the building at the expiration of the term at a price measured by its reasonable value, but not to exceed $50,000. The lease has still an unexpired term of over five years, if reinstated, and all improvements to the building will belong exclusively to the tenant for that period; but if, at the expiration of the term, the building is found to be worth more than $50,000, the landlord would be the gainer to the extent of the excess, and it might be that the improvements in question would suffice to make the value of the structure greater than this sum, even after five years' use by the tenant. Accordingly this case is not wholly analogous to that of a mortgagee in possession of property, who makes improvements which inure to the benefit of the redeeming mortgagor, as suggested by the landlord-appellant, since here the improving party had a possible interest in the property, which might be a valuable interest, and while we can have no doubt that the landlord should be allowed the expense of all reasonable

alterations, repairs and additions to the premises which would wholly benefit the redeeming tenant, there still might remain a question as to whether some of the expense would not be found, at the end of the term, to have been for the landlord's own benefit. The matter must be considered only as of the time when the lease shall expire, because the past benefit from the improvements, pending the tenant's repossession, is covered by the rent obtained by the landlord from new tenants, during the period of dispossession, and credited to this tenant upon the rent due under the lease.

It appears from the evidence, however, that the landlord caused the building to be appraised in the year 1896, in order that he might make application for the proper amount of fire insurance to cover its value, and this appraisal resulted in the value being found to be $50,000, at a period after all these alterations had been made.

There is no reason to assume that the landlord sought to have the value fixed at less than what the building was really worth; on the contrary, his desire and interest at the time was apparently to have the full value reached, in order that the insurance effected might be adequate, and that this was the full value the tenant did not attempt to dispute upon the trial, nor was any other evidence adduced by either party upon this subject.

Thus the justice was, we think, well authorized in charging the petitioner with the expense of these alterations, under the circumstances, since the work done, both in compliance with the orders of the building department and in remodelling the theatre in order that it might be made to produce revenue, were wholly for the benefit of the building itself, the petitioner's property, and, so far as they resulted in enhancing the value of the premises when out of his possession, he obtains the benefit of this when credited with the rental yielded through the leasing of the property during that period. If, at the expiration of the lease, these alterations shall have benefited the building, the agreement between the parties requires that the landlord shall pay their then value when purchasing the structure, and if he pays the upset price of $50,000 as the reasonable value, should it be such, it cannot be assumed that the payment would be inadequate, since the building was worth no greater sum when the alterations were newly made. Assuming, as is most favorable to the tenant, that no covenant of the lease called for his making these alterations as ordered by public authority, it is certain that the landlord was not chargeable with the expense, unless the building had been abandoned to him, and since the fail-

ure to comply with the order would have resulted in the loss of all use of the building for the purpose to which it was adapted, the charges must certainly be viewed as incurred on behalf of the party entitled to the exclusive enjoyment of the property, this petitioner, and he should bear them.

It clearly appears from the evidence that the remodelling of the theatre was not an improvident undertaking, that the circumstances called for some such action by the landlord at the time, and that the charges incurred were reasonable. He was placed in a position in which he was required to act both in behalf of the tenant, should there be redemption, and in behalf of his own interests, should the lease remain unredeemed, and the question whether or not his administration was prudent must be determined with regard being had to this dual aspect of the subject. That in the matter of these repairs and alterations there was no mismanagement of which the tenant could complain we are well prepared to agree with the justice below, and proceed to consider the further items which are in dispute.

When dispossessed, this tenant appears to have removed all fixtures from the premises, such as theatre seats and general furnishings of a place of amusement, and it became necessary for the landlord to refurnish the building if his efforts to secure another tenant were to be successful. Accordingly, he did procure such furniture as was essential to a proper equipment of the place and rented the premises, so furnished, or so to be furnished, to Thomas Canary, the rent received from this letting having been allowed to this petitioner, as before noted, in reduction of the sum due from him to the landlord for rent in arrear under the lease which is sought to be redeemed. The justice below has made an allowance to the landlord of the reasonable rental value of this furniture for the period of its use by Canary upon the basis of ten per cent. of its actual value, and the allowance is disputed by both sides, the petitioner claiming that none should be made, and the landlord that the basis of computation should be twenty per cent. instead of ten per cent. Evidently the justice found himself impressed with the testimony to the effect that ten per cent. was the reasonable ratio to be adopted for this computation, and we cannot say that the other evidence adduced in favor of an allowance of twenty per cent. was entitled to the greater weight. On the other hand, the landlord was certainly to be allowed the reasonable rental value of his furniture, the use of which, together with the use of the build-

ing, was clearly the inducement to the payment by Canary of an entire sum, which sum has been placed wholly to the petitioner's credit, and there should, accordingly, be placed to the landlord's credit the proportion of the rent which was not produced by the petitioner's building, but through the use of the landlord's own personal property. The item, as allowed, should stand.

The next point to be considered has to do with the landlord's dealings with Canary, touching the latter's tenancy during the period when this petitioner was out of possession, it being claimed that the landlord did not obtain sufficient rent from such tenant and wrongfully entered into an agreement with him, releasing him from payment for the alterations ordered by the building department.

It was satisfactorily made to appear that the landlord, when reducing the rent reserved in the Canary lease, acted reasonably for the best interests of the property, since, while insistence upon the letter of this lease was within his clear legal right, the prospect was that such insistence might well have resulted in the loss of the tenant, and, with the tenant, all revenue from the building, leaving but a cause of action, collection upon which may have been but a dubious possibility. The rent, as originally agreed upon with Canary, was shown to have been unwarranted by the value of the premises to the tenant, and there was no reasonable expectation of securing from a new tenant anything more than the amount which, under Canary's lease as modified, the landlord actually received. Therefore, it was quite proper for the justice to find that there had been no negligence in this instance of the landlord's management of the property.

With regard, also, to the agreement entered into between the landlord and Canary, at the time when the alterations which we have referred to were ordered by the building department, that Canary should not be required to defray the expense of such alterations, the instrument reciting that the parties agreed "that the alterations and repairs so required * * * are not of the nature of repairs or requirements to be borne by said Canary according to the true intent and meaning of said (Canary's) lease," we think that the landlord's course cannot properly be complained of by the petitioner. The probabilities strongly bear out the fact that the making of these alterations, involving an expenditure of more than $9,000, was never within the contemplation of the parties as being a part of Canary's obligations under his lease, and, if

this were the fact, although the lease itself may have contained phrases broad enough to cover such alterations as within Canary's covenant to repair, the landlord acted with propriety when adopting a modification of the lease which should express the true intent of the parties, under the extraordinary circumstances which had arisen, without requiring Canary to invoke the relief which a court of equity would afford him upon the admitted facts. If the expense was not within Canary's agreement it was necessarily to be borne by the party who owned the building, and, thus, was properly defrayed by the landlord for the account of this redeeming tenant, as we have said.

Still another question arises out of the making of these alterations, and here dissatisfaction with the result reached by the justice is expressed on either hand. The work in question necessitated the closing of the theatre for six weeks during Canary's tenancy, and it was agreed in writing that the rent for this period should be remitted by the landlord, who, in turn, was to be given possession of the building during the time, in order that he might have full control of the work. This agreement was carried out, as the justice has found, but he has made allowance to the landlord for but one-half of the rent thus remitted, in effect charging him with the receipt of a sum which he never received and which the petitioner should have proven to have come into the landlord's hands if he wished to be credited with the amount. The rent thus remitted amounted to $3,750, and the landlord has been held accountable to the petitioner for $1,875, on account of such rent. This charge was, it appears, inequitable, since the evidence does not support any finding that the failure to collect the sum was the result of a negligent administration by the landlord, and the justice, indeed, has not so found. The order of the building department necessitated the closing of the building, and this gave rise to the situation wherein the rent, so far, was suspended. The landlord did not receive the rent, and should not be made to pay it from his own pocket for the benefit of the petitioner, who is entitled only to the money which was actually produced by the building, or which would have been produced but for some mismanagement by the landlord of a degree which might evince a clear disregard of the petitioner's rights. Failing this fact, the apportionment of the sum between these parties must be based upon the assumption that the landlord was benefited in some way through Canary's tenancy of the building, but clearly he was not, since the avails of that ten-

ancy are credited wholly to the petitioner, and, accordingly, the matter is not one which justifies the resort to an apportionment.

The petitioner objects to the allowance of the amount of premiums paid by the landlord for insurance of the building against loss by fire during the period subsequent to the dispossession, but it appears that the item was properly allowed. The question is simply: For whose benefit did the building thus remain insured? Obviously for the petitioner's benefit, since he maintains his ownership of the subject of the insurance, the protection afforded to the property having been secured, as it now appears, to preserve it for his ultimate enjoyment. Had the premises been rendered valueless by fire, there would probably have been no redemption of the lease, but, the building now standing uninjured, the party who asserts his right to it must certainly bear the expense reasonably incurred for its protection and cannot be heard to say that, because there has been no actual loss, there was no risk to be guarded against. If the objection to this item were upheld, it could only be through placing all the risk of loss upon the landlord and permitting the petitioner to reap the exclusive benefit arising from a fortunate outcome of the hazard.

We think that the allowance for expenses incurred by the landlord on account of legal services necessarily secured in the dispossess proceedings, and surrounding matters, is to be upheld, as against the contention that no sum whatever could be credited to the landlord on account of his actual expenditure in this regard. The item is not assailed as excessive, upon the present appeal, and as we view the intent of the statute which regulates the adjustment of the account between the parties the object of the adjustment is to place the landlord and tenant, so far as may be, in the position in which, but for the dispossess proceedings, they would have remained. Those proceedings were brought about by the tenant's default, not because of the landlord's choice, and the latter should fairly be reimbursed for the necessary expense incurred by him in the matter. It may be, as claimed, that the item is not comprised as among the "costs and charges" which form the subject of the redeeming tenant's tender (Code Civ. Pro., § 2256), but the scope of the adjustment, upon the hearing of the proceeding, is not limited by the tender, and extends so far as substantial justice requires, as we have pointed out before.

Upon the same principle, the landlord was properly given credit for $54, representing his outlay on account of wages of a gas man,

electrician and janitor employed as custodians of the buildings, and in attending to its proper lighting, for the period during which the marshal was engaged in executing the dispossess warrant.

The justice properly disallowed the credit claimed by the landlord for commissions upon the rent collected from Canary, since it was found that no actual payment was made on account of services of a collection agent, and, in any event, it would appear that it was the landlord's duty to make collection of this rent without compensation. Had the petitioner remained in occupation, the landlord's collection of the rent reserved in the lease would have admitted of no reward, and there is no reason for charging the petitioner with commissions upon the collections made by the landlord from the substituted tenant when such petitioner now offers to pay over the full amount of rent which would have been due from him, without putting the landlord to the expense which might be entailed in its collection.

It appears that through some inadvertence the justice omitted from the summary statement of the account, as embodied in the final order, an item of $248.50, to the credit of the landlord, which was recited by the order specifically to have been allowed, and there should accordingly be a modification of the order in this regard.

We conclude that the order, as modified by the placing of the items noted ($1,875 and $248.50) to the landlord's credit, as in addition to the sums found by the justice to be receivable by him from the petitioner, should be affirmed, without costs.

It is noted that the justice has not fixed the date upon which the petitioner shall be let into possession, as against the present tenant, whose lease, under the terms of the statute, endures to the 1st day of May next succeeding the redemption, the order being framed in the words of the statute. The petitioner made his tender prior to May 1, 1897, and it has not been decided specifically whether the rights of the parties, with regard to Canary's lease, became fixed at that date or were in abeyance until the date of the final order, in which last event that lease would not be determined until the succeeding month of May. We think that the statute can only be read as intending that the redemption, so far as it becomes important to the fixing of the date when an existing lease shall expire, relates to the day of the tender (Code Civ. Pro., §§ 2256, 2258), and that, therefore, the petitioner is entitled to possession upon his compliance with the final order, as modified.

If the parties are entitled to any further direction as defining their subsequent rights in the matter, the question may be considered upon the settlement of the order to be entered upon this decision, of which two days' notice should be given.

DALY, P. J., and MCADAM, J., concur.

Final order as modified in accordance with opinion affirmed, without costs.

MARTIN D. LEVY et al., Respondents, *v.* GEORGE YAZBECK, GEORGE SABA et al., Appellants.

(Supreme Court, Appellate Term, December, 1897.)

1. **Replevin — A claimant under a fraudulent vendee must, as against the true owner, show himself to be a bona fide purchaser.**

   Where vendors disaffirm a sale of goods, as procured by fraud, and bring an action to recover the property, a party in possession of it, and who claims it under the fraudulent vendee, must prove himself to be a purchaser in good faith for value and without notice.

2. **Bona fide purchaser — Evidence — Consideration — Interest of witness.**

   Proof, dependent solely upon the testimony of the defendant, that the fraudulent vendee, who was indebted to him for the purchase price of the very business in which the indebtedness in question was subsequently contracted, and who had given his note for the price of the business, afterward transferred the whole stock of goods, including those in question, to the defendant in return for his own past-due note, while sufficiently proving the defendant to be a bona fide purchaser, need not be accepted by the trial court as proof of that fact; as the question of the credibility of an uncorroborated interested witness is one exclusively for the court.

APPEAL from judgment rendered by the justice of the Seventh Judicial District Court in favor of the plaintiffs in an action for replevin.

S. Vilas Beckwith, for appellants.

Samuel D. Levy, for respondents.

BISCHOFF, J. A sale of goods by the plaintiffs to the defendant Yazbeck, induced by the latter's fraudulent misrepresentations, was

disaffirmed upon discovery of the fraud, and in this action, brought to recover the goods, the plaintiffs' demand of possession was resisted by the defendant Saba, who claimed title, as a *bona fide* purchaser, under a bill of sale from Yazbeck.

Claiming through the fraudulent vendee, the burden of proving that he was himself a purchaser for value, in good faith and without notice, was upon this defendant Saba (Stevens v. Brennan, 79 N. Y. 254), and to support his claim he furnished no evidence other than his own testimony as to the transaction with Yazbeck, this being the testimony of an interested witness, and so not conclusive upon the trial court, even if not contradicted. Posthoff v. Schreiber, 47 Hun, 593. According to Saba's story, Yazbeck was indebted to him on August 7, 1897, in the sum of $10,000, this being practically a balance due, over prior payments, for the purchase price of the stock and good will of the business theretofore sold by Saba to Yazbeck, in the conduct of which business, after this sale, Yazbeck had purchased the goods in suit. Saba held the latter's promissory note for $13,000, representing the consideration, which note was overdue and unpaid on August 7th, and on that date Yazbeck retransferred the whole stock of the business to him, including the plaintiffs' goods, receiving back his note for the past indebtedness. When the question of consideration arises upon the transfer of negotiable paper, the absolute discharge of a prior indebtedness through a complete extinguishment of the original demand, if satisfactorily proven, may suffice to render the creditor, who takes a note of a third party, a holder for value (Phoenix Ins. Co. v. Church, 81 N. Y. 218), but the rules applicable to such a transfer do not operate to this extent in favor of a party who seeks to uphold his own purchase from a fraudulent vendee. Barnard v. Campbell, 58 N. Y. 73.

As was said in the case last cited: "There is no good reason or equity in placing the burden of a fraudulent sale upon a *bona fide* vendor rather than upon a *bona fide* purchaser from the fraudulent vendee, unless the purchaser has parted with his money, or some value upon the credit of possession or some evidence of title in the vendee received from the original owner, and by means of which he has induced the purchaser to treat with him as owner."

Such a purchaser, however, may be protected if he has relinquished some security held by him, trusting in the apparent ownership of the fraudulent vendee (Weaver v. Barden, 49 N. Y. 286), and so of the delivery up of a promissory note held as security for

a past indebtedness, whether overdue or not. Phoenix v. Church, *supra.*

The case of Paddon v. Taylor, 44 N. Y. 371, is directly in point, and it was there held that the purchaser from the fraudulent vendee who surrendered to the latter, as sole consideration, his note for a past indebtedness, was a purchaser for value as against the original vendor, and that any question as to maturity of the note was immaterial.

If Saba's story were credited, therefore, his defense would have been sufficient in law, since he further testified to his ignorance of the fraud, but his account of the transaction, while by no means wholly improbable, is in no way substantiated by extraneous circumstances. It stands alone, the testimony of an interested witness, and no significance can be attached to the plaintiffs' failure to contradict it, in view of the character of the matter, which was so closely personal to these two defendants. Significance, however, does certainly attach to the justice's finding upon the facts after hearing this individual's testimony, personally, and having had the opportunity, which this court has not, of observing the witness' demeanor when upon the stand.

His impressions may have been such as to lead him to distrust the witness and to justify his rejection of the story that Saba's ownership of the business had actually been transferred to Yazbeck at any time; this course was well within his province and would necessarily result in the finding that this defendant had failed to sustain the burden of proving that a consideration, other than colorable merely, existed for Yazbeck's transfer to him.

There was evidence, also, that at the time of this transfer Saba was removing the stock with suspicious haste and that he knew of Yazbeck's insolvent condition. Further, it appeared that he had solicited orders for the sale of a quantity of this stock some days before he obtained the bill of sale from Yazbeck, and his explanation of this may readily have been found unsatisfactory by the justice.

The rule that the credibility of an interested witness is exclusively a matter for the trial court to determine, in the absence of corroborating circumstances, is a salutary one, and calls for no exception in the present case. Judgment affirmed, with costs.

DALY, P. J., and MCADAM, J., concur.

Judgment affirmed, with costs.

JAMES FLANAGAN et al., Appellants, *v.* THOMAS CALLANAN, Respondent.

(Supreme Court, Appellate Term, December, 1897.)

1. **New trial for newly-discovered evidence — Powers of Appellate Term on appeal from a District Court — Evidence receivable upon appeal.** The Appellate Term of the Supreme Court cannot grant a new trial upon the ground of newly-discovered evidence where the appeal is taken from the judgment of a District Court of the city of New York; nor can evidence be received upon appeal for the purpose of reversing a judgment, as it is only admissible where it tends to sustain the judgment.

2. **Same — Powers of a justice of a District Court.** *Semble*, that a justice of a District Court of the city of New York has no power, after judgment rendered upon litigated issues, to grant a new trial upon the ground of newly-discovered evidence, as his jurisdiction extends only to a motion made upon the grounds specified in section 999 of the Code of Civil Procedure (Laws of 1896, chap. 748).

APPEAL from judgment rendered by the justice of the Thirteenth Judicial District Court, in favor of the defendant.

J. Baldwin Hands, for appellants.

John F. McIntyre, for respondent.

BISCHOFF, J. The defendant had entered into a contract with the department of public works, under which he had assumed the work of grading a certain street within sixty days from the time when he should be ordered by the department to commence the labor, the right being reserved by the municipality to order suspensions of the work from time to time, as it should see fit, and the period of the suspensions to be excluded from the computation of time for defendant's performance.

The plaintiffs, engaged in the general business of excavating, found it desirable that they be permitted to deposit surplus material at some place within the city, and, accordingly, entered into an agreement with the defendant, whereby, in consideration of the payment to him of $150, they were given the privilege of dumping earth upon the street which defendant was grading, the material to

be used by him in raising the level of the street. The exact terms of this agreement, as to the time granted to the plaintiffs, were in dispute, it being claimed by the defendant that they were to be allowed only sixty days, while the plaintiffs claimed that defendant had promised to procure extensions of his own time to an indefinite extent, by causing the work to be suspended at the order of the authorities, to the end that when the plaintiffs had occasion to dump earth they should thus have a place for the purpose.

However this may be, it appears that the defendant did procure a suspension of the work for some eight months, after the plaintiffs had deposited fifteen loads of earth, but the work was then peremptorily ordered to proceed by the authorities, and the defendant, after notifying plaintiffs of the necessity for haste and obtaining no satisfactory assurance that they would further avail themselves of their privilege, opened the street as a public dump. This action was brought to recover the sum of $150 paid by plaintiffs, and the justice has found for the defendant. Upon the facts in evidence it was quite proper for the court to find that the defendant had not undertaken to procure an indefinite number of extensions of time, and that he had not placed himself in default through his failure to obtain a further order suspending the work.

For the plaintiffs it is contended, however, that by the terms of their agreement, as reduced to writing, they were to be allowed the full time which was available to the defendant under his contract with the municipality, and that inasmuch as he had opened the place to the public, as a dump, before the expiration of that period, excluding the time when the work was suspended, he had wrongfully prevented their enjoyment of the privilege for which they had paid.

This written agreement had apparently been mislaid at the time of the trial, and the appellants ask that it be read as evidence upon this appeal and that a new trial be granted, as for newly-discovered evidence.

With regard to the questions of the appellants' practice, there seems to be no statutory provision authorizing this court to grant a new trial upon newly-discovered evidence where the appeal is taken from the judgment and, generally, evidence is to be received upon appeal only for the purpose of sustaining a judgment, never for the purpose of reversing it. Day v. Town of New Lots, 107 N. Y. 148, 157; Munoz v. Wilson, 111 id. 295, 299.

It would seem also that the justice below would have been without

power to grant the motion for a new trial upon this ground, since, after judgment was rendered upon litigated issues, his jurisdiction extended only to a motion made upon the grounds specified in section 999 of the Code of Civil Procedure (Laws 1896, chap. 748), of which this ground is not one.

It may be that this court should seek authority to relieve a party thus situated in a proper case, but such a case this is not, since it does not appear that the evidence in question would have affected the result, if offered at the trial; in fact, it is clear that it would not. Turning to the opinion delivered by the justice, we find that he conceded the plaintiffs' right to dump earth upon this street after the work was finally ordered to proceed, but that he based his decision upon an abandonment of their privilege at that time, and there was evidence in the case amply sufficient to support his conclusion.

By the evidence alluded to, it was made to appear that the plaintiffs had so acted as to justify the defendant's reliance upon their intention to avail themselves no longer of their license, and thus his consequent act of giving a general license to the public for the purpose, in view of the recognized necessity that the ground be filled in, did not place him in default to the plaintiffs. His continued readiness to perform, up to the time of this abandonment, was certainly consideration for the payment by the plaintiffs sufficient to defeat their demand for its return in an action for money had and received based upon the failure of consideration, and the judgment must, accordingly, be affirmed, with costs.

DALY, P. J., and MCADAM, J., concur.

Judgment affirmed, with costs.

THOMAS MARTIN, Respondent, *v.* EDWARD W. GUINDON et al., Appellants.

(Supreme Court, Appellate Term, December, 1897.)

Contract — Consideration.

A sufficient consideration for an executed agreement, made by the driver of an express wagon, that his employers might deduct from his wages the value of a package which he negligently lost from their wagon, and for which they were obliged to pay the consignor, exists in

the fact that the deduction was agreed to be made in installments, at periods convenient to the driver, and in the further fact that, had he refused to make good the loss, he might have lost his employment.

APPEAL from judgment rendered by the justice of the First Judicial District Court in favor of the plaintiff.

Dudley R. Horton, for appellants.

John Callahan, for respondent.

BISCHOFF, J. The plaintiff has obtained a judgment for $30.30 upon his claim for wages due him as an employee of the defendants in their business as expressmen, this sum representing the total of deductions made from his wages at successive periods by the defendants to reimburse them on account of their payment for the loss of a package of cigars consigned to them for delivery and which had been lost when in charge of the plaintiff as driver and delivery agent.

Upon the trial it was admitted that the package was lost when in the plaintiff's custody, and that the defendants had made good the loss to the consignor; further, the plaintiff admitted that the defendants had delivered to him the consignor's written receipt of payment when thus made, and that the successive deductions from his wages were stated in each instance to have been made on account of this loss, he having accepted the sum tendered him and signed the pay-roll on every occasion without demur. When finally discharged from the defendants' employ he made no demand for the sum in question, and his claim is now based upon the alleged omission of any agreement whereby the defendants were justified in withholding this portion of his earnings. For the defendants it was testified that at the time of the loss the plaintiff had conceded his liability for the value of the package and had asked that the sum be taken from his wages in instalments, the method actually adopted; but, in his own behalf, he testified that no such matter had taken place, and gave further testimony tending to show that the loss had not been occasioned by his negligence.

Were the question of negligence now properly open, it might, perhaps, have been found by the justice that the plaintiff had exercised reasonable care at the time, according to his own testimony, but it appears to us, in view of his admitted attitude of acquiescence

upon the subject throughout the period of his employment, that the weight of the evidence was clearly with the defendants in their contention that, if there had been a possibility of dispute upon this question of the plaintiff's responsibility, it had been resolved in their favor by agreement between the parties and that the plaintiff was benefited by their concession that he should refund only in convenient instalments the amount which they were called upon to pay out at once. If, in truth, he did not at the time consider himself justly charged with the loss, the obvious implication from the facts is that the plaintiff found it to his own interest to refrain from disputing his liability, that the opposite course would have been taken at the risk of his employment, and, if this were the fact, there was certainly sufficient consideration to support the admission which was to be implied from his attitude, with the result that he would be bound by his selection to retain the employment through a voluntary abandonment of this disputable question of his remissness in the course of his duties. See Jennings v. Prudential Ins. Co., 18 Misc. Rep. 470.

The judgment must be reversed, and a new trial ordered, with costs to appellants to abide the event.

DALY, P. J., and MCADAM, J., concur.

Judgment reversed and new trial ordered, with costs to appellants to abide event.

MOSES ROSEN, Respondent, *v.* NATHAN S. ROSENTHAL, Appellant.

(Supreme Court, Appellate Term, December, 1897.)

District Courts — Demand of an account, on joining issue — Record should show that the account was ordered to be exhibited or stated.

Proper practice, under section 2942 of the Code of Civil Procedure, made applicable to District Courts in the city of New York (Laws of 1882, chap. 410, § 1347), and giving the court power, upon the request of either party, at the joining of issue, to require the adverse party "to exhibit his account or demand or to state the nature thereof, as far as it is in his power so to do, at that or another specified time," and providing that, in case of default, the party may be precluded from giving evidence of parts not exhibited nor stated, requires some formal

determination and direction by the court in the matter, the terms of which should be entered upon the record; and where the record, in an action for goods sold and delivered, shows no action by the court which requires the plaintiff to exhibit his account or to state its nature, an objection made, upon the part of the defendant, to evidence of the plaintiff as to the nature of the goods sold, based upon the statement of the defendant's counsel that, although he had demanded a bill of particulars, none had been furnished, cannot prevail upon an appeal.

APPEAL by defendant from judgment of the Fourth District Court.

L. G. & W. A. Goodhart, for appellant.

Morris Hillkowitz, for respondent.

Per Curiam. Section 2942 of the Code (made applicable to District Courts by section 1347 of the Consolidation Act) provides that "The court may, upon the request of either party, made when issue is joined, require the adverse party to exhibit his account or demand, or to state the nature thereof, as far as it is in his power so to do, at that or another specified time; and in case of his default, it may preclude him from giving evidence of such parts thereof, as have not been so exhibited or stated."

The justice certifies that on the return of the summons the parties appeared by their respective attorneys; that the plaintiff complained for "goods sold and delivered;" that the defendant answered as follows: "General denial, bill," and that thereupon the cause was adjourned for trial.

At the trial the plaintiff testified that he was suing for $95.71, and that he had sold the defendant goods. He was then asked what kind of goods, and the justice's return shows the following: "Objected to by counsel for the defendant, who moves that the plaintiff be precluded from giving any evidence, on the ground that a motion for a bill of particulars was made, but no bill has been furnished. Motion denied. Exception." The defendant apparently relies on this exception.

There is nothing in the return which indicates that the court, when issue was joined, required the plaintiff to exhibit his account or demand, or to state the nature thereof further than he had in his oral complaint, and the fact that the justice refused to preclude the

plaintiff from giving evidence of his account would imply that no such direction had been made.

We think that this provision was intended to entitle either party to make application to the court upon joinder of issue "to require the adverse party to exhibit his account or demand, or to state the nature thereof as far as it is in his power so to do," that the court may determine whether it is a proper case for such a direction, and specify in the direction when and in what manner such account should be exhibited. Upon making such direction the justice, to preserve evidence thereof, may cause such entry to be made as he deems proper; or he may reduce the direction to the form of an order, to be filed or served, as he may direct. Good practice requires this, that neither party may be surprised by objections at the trial. Gebhard v. Parker, 120 N. Y. 33.

The Code (§ 531) provides, in regard to courts of record, that "It is not necessary for a party to set forth, in a pleading, the items of an account therein alleged; but in that case he must deliver to the adverse party, within ten days after a written demand thereof, a copy of the account, which, if the pleading is verified, must be verified by his affidavit, to the effect that he believes it to be true. * * * If he fails so to do, he is precluded from giving evidence of the account," etc.

It will be readily seen that the demand provided for by section 531 (which is not applicable to District Courts), is essentially different from the provision of section 2942, which authorizes the court to require the adverse party to exhibit his account, etc.

The action was originally brought against the defendant as "Samuel Rosenthal," but by consent the record was amended so that his name should read "Nathan S. Rosenthal." The question litigated at the trial was whether the goods were sold to the defendant or to his father, Abraham Rosenthal, and the justice, upon conflicting evidence, found that they were sold to the defendant. We find no reason to differ from the conclusion reached, and the judgment must be affirmed, with costs.

Present: DALY, P. J.; MCADAM and BISCHOFF, JJ.

Judgment affirmed, with costs.

ISAAC JOSPE, Plaintiff, *v.* WILLIAM LIGHTE and CHARLES LIGHTE, Defendants.

(Supreme Court, Appellate Term, December, 1897.)

Opening judgment where there is no cause of action — Excuse for default.

The court will not open a judgment, rendered in an action, dismissing the complaint upon a default, upon the ground that the judgment was taken against the plaintiff through his mistake, inadvertence, surprise or excusable neglect (Code of Civil Procedure, § 724), where it is clear that the action cannot be maintained; nor will the court act where the excuse offered by the plaintiff is unsatisfactory.

MOTION by plaintiff to open affirmative judgment by default.

A. H. Sarasohn, for motion.

Ennever & Trautman, opposed.

Per Curiam. While the court may, in its discretion, and upon such terms as justice requires, relieve a party from a judgment taken against him through his mistake, inadvertence, surprise or excusable neglect (Code, § 724), the party seeking relief must have merit in his appeal and show that injustice might follow a denial of his application.

It appears that the plaintiff on August 8, 1896, paid to the defendants $62 "for the privilege of fountain and stand situated at 118 Orchard street." The agreement does not express any term. The plaintiff paid, in addition, a rental of $15 a month; the last payment made being up to April 8, 1897.

About April 1, 1897, the plaintiff was in some manner dispossessed, but how or by whom does not clearly appear. He then went to the defendants, and their bookkeeper said he could do nothing in the matter except to allow him for the rent from April 1st to April 8th. The bookkeeper thereupon paid the plaintiff $3.75, tore up the old receipt to April 8th, which the plaintiff had handed over, and gave the latter a new one to April 1, 1897. The plaintiff accepted this new receipt and the $3.75, and thereafter brought this action for "money had and received and breach of contract." He evidently abandoned the breach of contract portion of his complaint, however, because he failed to prove as an indispensable ground of recovery therefor any damages whatever, and

the action apparently proceeded on the theory of want of consideration or of rescission.

As the plaintiff had the uninterrupted use of the property from August 8, 1896, to April 1, 1897, a period of nearly eight months, it cannot be seriously contended that there was a rescission or such a failure of consideration as to entitle him to the return of the $62, and it was upon this ground that the justice dismissed the complaint. We find no error in the ruling.

Aside from this, the excuse offered by the plaintiff for his default is not of that satisfactory character which would warrant us in granting the motion. Motion denied, without costs.

Present: DALY, P. J.; MCADAM and BISCHOFF, JJ.

Motion denied, without costs.

MARY E. SPENCER, Plaintiff, *v.* THE GRAND LODGE OF THE ANCIENT ORDER OF UNITED WORKMEN OF THE STATE OF NEW YORK et al., Defendants.

(Supreme Court, Erie Special Term, December, 1897.)

1. **Benefit societies cannot, by subsequent by-laws, affect the vested right of a member to designate any beneficiary he pleases.**

Where the right of a member of a benefit society to designate a beneficiary is unrestricted at the time when a certificate of insurance was issued to him, it cannot be affected, so as to defeat a recovery upon the certificate, by by-laws subsequently enacted by the Supreme Lodge of the order declaring, generally, that the beneficiary must be a member or members of his family or must be one related to him by blood or a person who shall be dependent upon him.

2. **Same — Power to pass retroactive by-laws.**

Quaere, whether the Supreme Lodge of such a benefit society has power to enact subsequent legislation which would practically abrogate existing certificates which were valid in their inception?

ACTION upon certificate of a benefit society.

Perry C. Reyburn, for plaintiff.

William C. Greene, for defendant Ransom.

Morris & Smith, for defendant Cothran.

A. C. Harwick, for defendant A. O. U. W.

SPRING, J. The defendant is a benefit association with a large membership, the chief aim of which is to provide a beneficiary fund in the nature of an insurance on the lives of its members. The local organizations are called subordinate lodges, and above those is the Grand Lodge, usually of state jurisdiction, and still superior to that is the Supreme Lodge, made up of duly elected representatives of the grand lodges.

In October, 1888, Charles O. Spencer became a member of Youngstown Lodge, No. 289, and upon his application a beneficiary certificate for $2,000 was issued by the Grand Lodge, payable to defendant Daniel D. Cothran, $200, and to A. E. Haskell, $1,800. In 1890, upon the application of said Spencer, this certificate was canceled and a new one issued, payable $400 to said Cothran, and $1,600 to defendant Ransom. Spencer continued to keep up the assessments on this certificate, and, at his death, in March of this year, he was in good standing in the order, and his certificate remained uncanceled and apparently operative. Spencer was unmarried, and the beneficiaries named in the certificate were not his relatives or dependents. The plaintiff is his mother and next of kin.

The certificate had a valid inception and infringed upon no rule or by-law of the order in force at that time, as the member had an unrestricted right to designate the beneficiary. § 1, art. 2, Constitution of Grand Lodge; Sabin v. Phinney, 134 N. Y. 423; Massey v. Mutual Relief Society, 102 id. 523.

Subsequently, and in 1895, the Supreme Lodge amended its by-laws as follows: "Each member shall designate the person or persons to whom the beneficiary fund due at his death shall be paid, who shall, in every instance, be one or more members of his family, or some one related to him by blood, or who shall be dependent upon him."

The claim of the plaintiff and of the association is that this has a retroactive effect, and consequently nullified the certificate issued on the application of Mr. Spencer, so far as the designation of persons is concerned. There is nothing in the language of the section implying it was to relate to certificates valid when issued. It makes no provision for calling in these certificates; it does not provide for any notice to any member of the order who was keeping up assessments innocent of any impairment of his certificate, and no action in fact was taken indicating this drastic, retrospective construction was designed by the passage of this enactment.

Certainly a provision of this kind will not be given a retroactive interpretation unless such an intent is clearly manifest. Bacon on Benefit Societies, parakraph 187; Wist v. Grand Lodge A. O. U. W., 22 Oreg. 271; Niblack on Benefit Societies, paragraphs 162, 162a; Sargent v. Knights of Honor, 158 Mass. 557; Benton v. Brotherhood of Railroad Brakemen, 146 Ill. 570; Gundlach v. Germania Mutual Assn., 4 Hun, 339.

The courts will not intervene to put a construction upon this provision to annul outstanding certificates where there is nothing in the conduct of the association itself warranting that interpretation.

In Wist v. Grand Lodge A. O. U. W., 22 Oreg. 271 (*supra*), where this subject was very carefully considered, the court used the following language: "The law does not undertake by its terms to disturb what has been done; it does not nullify previous appointments. * * * It is a settled rule of construction that laws will not be interpreted to be retrospective unless by their terms they are clearly intended to be so, they are construed as operating only on cases or facts which come into existence after the laws were passed. * * * Rights will not be interfered with unless there are express words to that effect. It is not enough that upon some principles of interpretation a retroactive construction could be given to the law, but the intent to make it retroactive must be so plain and demonstrable as to exclude its prospective operation."

I have much doubt as to the power of the Supreme Lodge to enact legislation practically abrogating certificates of this kind. The charter authorized the member to designate whomsoever he wished as the recipient of his benefit. He paid for this privilege, and the designation of the beneficiary is as much of the essence of the certificate as the amount to be paid, and if it is fairly within the compass of this association to change radically the certificate in any respect, it is vested with a dangerous power.

Waiving that question, however, the language of this provision does not assume to be retrospective. The defendant, the Grand Lodge, has collected the assessments for this death loss and stands ready to pay when the proper beneficiaries are ascertained, so its interest is purely sentimental and perfunctory, and its objection that it has not been served with the answer of the defending beneficiaries has no merit.

The defendants Cothran and Ransom are entitled to the fund in compliance with the designation made in the certificate.

Ordered accordingly.

THE PEOPLE OF THE STATE OF NEW YORK, Plaintiffs, *v.* CHARLES JOHNSON et al., Defendants.

(Supreme Court, Erie Criminal Term, December, 1897.)

Athletic clubs — Lease of a part of a building — When such a club cannot give exhibitions, for which tickets are sold to the public.

The provisions of the Horton Law (Penal Code, § 458), permitting sparring exhibitions, with proper gloves, to be held by a domestic incorporated athletic association in a building leased by it, for athletic purposes only, for at least one year, are not violated by the fact that such an association does not occupy, under lease, an entire building but merely rents a portion of its third floor, while the rest of the building is occupied by other tenants; but such an association, incorporated under the Membership Corporations Law (Laws of 1895, chap. 559), cannot give sparring exhibitions, for which admission tickets are sold to the public at large; and this, although the tickets, in order to avoid the effect of the statute, are denominated upon their face, "Membership Ticket."

PROCEEDINGS under section 463 of the Penal Code, requiring defendants to give a bond that they will not for one year violate section 458 of the Penal Code.

Simon Fleischmann and Philip V. Fennelly, for the People.

William F. Mackey and Charles J. Thomas, for defendants.

WOODWARD, J. This is a proceeding under section 463 of the Penal Code to require defendants to give a bond that they will not for one year violate section 458 of the Penal Code, which prohibits, among other things, prize fighting absolutely, and sparring exhibitions except under certain restrictions.

The evidence taken shows that the defendants on the evening of December 16, 1897, were about to engage in a sparring exhibition in the rooms of the Live Stock Exchange Athletic Club of

Buffalo, for which admission tickets had been sold to the public at large.

The statute, so far as applicable to this case, provides substantially that a person who engages in a public or private sparring exhibition, with or without gloves, within the state, at which an admission fee is charged or received, directly or indirectly, is guilty of a misdemeanor, provided, however, that sparring exhibitions with proper gloves may be held by a domestic incorporated athletic association in a building leased by it for athletic purposes only for at least one year. Penal Code, § 458.

The association in question was incorporated for athletic purposes under the Membership Corporations Law, being chapter 559 of the Laws of 1895, and the club occupied a portion of the third floor of a large brick building, the remaining portions of which building were occupied by other tenants for office and other business purposes.

The People contend that the law was violated, in this instance, in the first place, because the club does not occupy an entire building devoted to athletic purposes only. To this proposition I cannot give assent, as I think the requirements of the statute in this respect are reasonably complied with when an incorporated association occupies for its exclusive purposes a portion of a building.

The next contention of the People is more serious, and in view of the importance of having a judicial construction of this section of the Penal Code, known as the Horton Law, and having in mind the fact that the People could not appeal from a decision adverse to them, and that the provisions of the act should have the construction of the upper courts, I have concluded to give the People the benefit of a decision of the question, which in any event is a close one. The point raised and which has impressed me with much force is that a corporation organized under the Membership Law cannot charge an admission fee for sparring exhibitions given under its auspices. The Membership Law has superseded the older social club law, and it provides, among other things, that the term "membership corporation" does not include a stock corporation or a corporation organization for pecuniary benefit. 2 R. S. (9th ed.) 1433, § 2.

The same act further provides that a membership corporation may be created thereunder for any lawful purpose, except a purpose for which a corporation may be created under any other article of the chapter or any other general law. Id. 1442, § 30.

The Business Corporation Law of the state provides for corporations organized for any lawful business purpose and the issuing of stock, etc. Id. 1384, § 2.

All of these provisions as to corporations were in force prior to the passage of the Horton Law, which allows sparring exhibitions by incorporated associations as above referred to.

The contention of the People, therefore, seems reasonable that the legislature did not intend, in passing the Horton Law, to allow associations incorporated under the Membership Law to engage in business or occupations for pecuniary profit, but intended to allow such associations to have sparring exhibitions for its members privately, or, in any event, did not intend to permit such associations to charge admission fees to such entertainments. This construction appears to have been put upon the law by many of the associations themselves, as the evidence shows that the association here involved, as well as others, have printed upon their tickets of admission the words, "Membership Ticket," which the counsel for the defendants fairly admitted in court was a mere subterfuge supposed to bring the clubs within the protection of the Horton Law.

Under the circumstances, I have concluded to hold the defendants each under a nominal bond of $100, as provided in section 463 of the Penal Code.

Ordered accordingly.

JOSEPH WENDEL, Plaintiff, *v.* LOUISE WENDEL, Defendant.

(Supreme Court, Kings Special Term, December, 1897.)

1. Marriage — Annulment of — False statement of a woman, that she was capable of bearing children.

Where a woman, interrogated by her husband before marriage upon the subject, states that she is physically and mentally capable of being a wife, while the fact is that, some years before, she had submitted to a surgical operation which made her thereafter incapable of conception or of having children, her suppression of the truth amounts to a fraud which justifies the court in annulling the marriage under the provisions of section 1743 of the Code of Civil Procedure.

2. Same — Barrenness after marriage.

Semble, that a marriage should not be annulled merely because the wife is barren.

ACTION to procure a decree nullifying a marriage upon the ground of fraud.

Baldwin F. Strauss (J. W. Ridgway, of counsel), for plaintiff.

Gustave Hurlimann, for defendant.

HIRSCHBERG, J. This action is brought to procure a decree nullifying a marriage. The parties were married in this state in June, 1896, and lived together until the following March, occupying the same room for only a very short period. The complaint charges that the defendant's ovaries were removed by a surgical operation some years before the marriage, and that this fact was unknown to the plaintiff. The defendant's answer admits the operation and the resultant fact that she cannot conceive or become a mother. It is not claimed that the husband was informed of the nature of the operation before the marriage, nor is it proved that he had intercourse with his wife after the discovery. The defendant was a witness on the trial, but did not testify that she told her husband of the operation. The plaintiff testified that at the time of the marriage he did not know that his wife's ovaries had been removed; that she did tell him that an operation had been performed; but said that it was the Caesarean operation rendered necessary in the delivery of a child by a former marriage; that no bad effects had resulted from the operation; that she was physically and mentally healthy; and that she "did not know certain whether she would be able to bear children or not." He adds that she did not tell him the cause or reason of her doubt. This evidence is undisputed, and the sole questions presented are first, whether the husband is entitled to the annulment of a marriage contracted without knowledge on his part that his wife was physically incapable of conception as the result of a surgical operation known to her, but concealed from him, and secondly, whether the consent obtained by such suppression is obtained by fraud.

Section 1743 of the Code of Civil Procedure provides that an action may be maintained to procure a judgment declaring a marriage contract void and annulling the marriage, among other causes existing at the time of the marriage, where one of the parties was physically incapable of entering into the marriage state. Was the

defendant at the time of the marriage physically capable of entering into the marriage state within the meaning of this statute? The answer depends in great measure upon what are recognized by law as the objects and purposes of marriage. If sexual intercourse alone is so recognized, then it must be conceded that the defendant was physically capable. But the creation of a family is also regarded as one of the chief purposes of a matrimonial union, and it is difficult to see how an individual can be physically capable of performing the contract who has lost the organs essential to conception. The question is different from that presented by sterility or barrenness. It is well settled that a marriage will not be annulled for the mere barrenness of the wife. Not only is such a condition and its continuance difficult, if not impossible, to prove, but its existence, if established, may not be innate, but only peculiar to an inharmonious combination. In such cases, whether the power to conceive or to impregnate be at issue, the question of the condition and its permanence rests on hypothesis and speculation, and is practically beyond the pale of judicial scrutiny. Impotence in such cases is the sole and settled ground of nullity. But it seems to me that the question is vitally distinct where the barrenness is absolute, is not a constitutional quality, or a functional failure, but a physical incapacity, resulting from congenital malformation or the total loss of the organs of conception by disease or the surgeon's knife. The two purposes of marriage are stated in Bishop on Marriage and Divorce, vol. 1, § 322, 6th ed., as follows: "'As the first cause and reason of matrimony,' says Ayliffe, 'ought to be the design of having an offspring, so the second ought to be the avoiding of fornication.' And the law recognizes these two as its 'principal ends;' namely, 'a lawful indulgence of the passions to prevent licentiousness, and the procreation of children, according to the evident design of divine providence.'" Other text writers equally recognize the propagation of the family as one of the great objects of marriage, but most of them, so far as I have been able to discover, have fallen into the error of regarding the decision of Deane v. Aveling, 1 Rob. Ecc. 279, as establishing the contrary principle. "It will be observed," Schouler on Domestic Relations, 5th ed., § 19, for example, "that this case establishes a principle which later cases do not undermine; namely, that it is capacity for fulfilling the conditions of copulation, and not of procreation, that our own law regards." The case of Deane v. Aveling does not establish the principle quoted, because what was said by the court on that sub-

ject was mere dictum. In that case there was peculiar malformation which prevented true copulation, and the decree was granted upon that ground alone. There was an entire absence of the uterus, and the court did say, referring to that fact: "If there be a reasonable probability that the lady can be made capable of *vera copula*, of the natural sort of *coitus*, though without the power of conception, I cannot pronounce this marriage void." Upon the strength of this assertion, viz., that the court would not have annulled the marriage because of the absence of a uterus, and, notwithstanding the marriage was annulled for incapacity, this case seems to have been quite generally adopted as leading authority for the proposition that our law regards copulation and not procreation as the legitimate object of matrimony, and as the only consideration involved in actions based on physical incapacity. But the counsel for the defendant has not been able to cite a single case, nor have I found one, where the court refused to annul a marriage, the defendant being without organs of procreation. The reasoning of Dr. Lushington in Deane v. Aveling is not satisfactory, and the case not being authority on the question at issue here, I hold that within the meaning of our statute a person destitute of child-bearing organs is physically incapable of the chief and higher purpose of matrimony and consequently of entering the marriage state.

It follows also that in concealing from the husband the fact and the extent of her misfortune, the defendant procured his consent to marry her by fraud. Her statement that she was physically and mentally healthy was made in reply to his inquiry whether she was physically and mentally capable of being a wife, and good faith required that she should have then disclosed the fact that the surgical operation involved the removal of the ovaries. Had the plaintiff married her with that knowledge, he would of course be estopped from action because of her physical condition. But it would be repugnant to justice to enforce a contract entered into by one who is ignorant of the fact that the other has been rendered incapable of fulfilling its conditions, which fact has been concealed by the delinquent party, and could not have been ascertained by independent inquiry.

On the grounds stated, the plaintiff is entitled to a decree.

Decree for plaintiff, without costs.

THE BOTANY WORSTED WORKS, Plaintiff, *v.* FREDERICK B. WENDT et al., Defendants.

(Supreme Court, New York Trial Term, December, 1897.)

Counterclaim — Return commissions of consignees — Trade custom.

Where a general custom exists in a trade that, where a consignor takes goods away from a consignee before a sale has been made, the consignee shall receive an equitable allowance to cover the expenses of handling, insuring and storing the goods while they were in his charge, this allowance being denominated "return commissions," consignees, not in default, may interpose, to an action brought by a consignor for a balance alleged to be due upon goods consigned and not accounted for, a counterclaim for reasonable "return commissions."

ACTION to recover proceeds of sale of consigned goods. Answer, counterclaim for commissions on goods returned to consignors.

Briesen & Knauth, for plaintiff.

Chas. Wehle, for defendants.

MCADAM, J. The plaintiff, a manufacturer, consigned a quantity of goods to the defendants, as commission merchants, for sale. The action is to recover $1,067.26 as a balance of proceeds unaccounted for. The defendants set up a counterclaim for "return commissions" — a phrase which in the trade means that on goods taken away by a consignor before sale the consignee receives an equitable allowance to cover the expense of handling, insuring and storing the goods while in his charge. The consignees in this instance handled, insured and stored the goods, and the action of the consignor in recalling the goods and revoking the authority to dispose of them deprived the consignees of an opportunity to reimburse themselves by the agreed commission of eight per cent. on a sale of the property. It appears that a like claim for return commissions was made by the defendants in regard to a previous consignment, and the plaintiff, under date of July 13, 1894, recognized it by writing: "While we agree that the storing of goods costs some expense for insurance, we think these expenses are a part of conducting commission business, but can be claimed in fairness while

goods are returned." The plaintiff, therefore, knew as early as July, 1894, that return commissions were expected by the defendants on goods recalled by the consignor, and the subsequent dealings became impressed with this understanding. Story on Cont., § 651. The entire system of brokerage has its origin in custom, which has regulated the cases in which it is payable and the rate chargeable in the particular instance. "All trades have their usages, and when a contract is made with a man about the business of his craft, it is framed on the basis of its usage, and becomes part of it, except when its place is occupied by particular stipulations." Laws & Usages, p. 53, § 24; Addison on Cont.. (2d Am. ed.), 851. The usage of a particular business " when it is reasonable, uniform, well settled, not in opposition to fixed rules of law, not in contradiction of the express terms of the contract, is deemed to form a part of the contract and to enter into the intention of the parties." Walls v. Bailey, 49 N. Y. 464, 468; S. C., 10 Am. Rep. 409; Johnson v. De Peyster, 50 N. Y. 666; Harris v. Trumbridge, 83 id. 92; Rickerson v. Hartford Ins. Co., 149 id. 315, 316; Broom's Leg. Max., 682, 889, 891; 1 Gr. Ev., §§ 292, 294; Clark on Cont. (Hornbook ed.), 583, 584; 6 Wait's Act. & Def. 624; 1 Laws, R. & R., p. 468; Kraft v. Fancher, 44 Md. 204. The custom, however, must be shown to have been known to the parties when the contract was made, or to have been so generally known as to raise a presumption that they had it in mind at the time. Rickerson v. Hartford Ins. Co., *supra*. The custom in this case was of a general character, and, moreover, the letter of July 13, 1894, shows that the plaintiff was made aware of such custom before the transaction in suit. The actual expense to which the defendants were put was equal to about four per cent. of the value of the goods returned, but by the custom, which is a reasonable one, they became entitled to charge but two and a half per cent. If the defendants had been guilty of misconduct whereby they forfeited all right to equitable consideration, or had voluntarily sought to terminate the contract, and the plaintiff had been compelled in consequence to accept a return of the goods as upon rescission or revocation by the consignees, it might well be that commissions could not be claimed. But that is not the case. Nothing having been said at the time about indemnifying the consignees for their expense, it was quite proper to revert to the general custom of the trade, which may be done "to annex unexpressed incidents to contracts." 8 Wait's Act. & Def. 516; Clarke's Brown on Usages, note, p. 23; 1 Cooley's

Bl. 76, note; Story on Cont., § 15; 2 Pars. on Cont. (6th ed.), 547. Upon these conclusions, the plaintiff is entitled to judgment for $149.36, with interest from October 31, 1894.

Ordered accordingly.

BENJAMIN G. ALLEN et al., Plaintiffs, *v.* CHARLES E. STEVENS et al., Defendants.

(Supreme Court, Onondaga Special Term, December, 1897.)

1. **Will — Devise for charitable purpose — Equitable conversion — Suspension of power of alienation — Chapter 360, Laws of 1860.**

The will of a testator, dated September 15, 1893, devised his residuary estate, consisting of real and personal property, to trustees to found, erect and maintain the Graves Home for the Aged, "for those who by misfortune have become incapable of providing for themselves and who have slender means of support," and he "authorized and empowered" them to sell and convey all or any of his real estate. A subsequent provision, after authorizing his executors and trustees to retain his stock in a banking company, and to continue the business of banking "for a term of years in their discretion," directed "but the same is not to be continued nor any portion of my property held longer than the lives of Catherine Graves Roby and Helen Breeze Graves." The testator died July 21, 1896, and left a widow but no descendants. The personal property was insufficient to pay the debts and legacies. In an action for a construction of the will brought by the heirs-at-law and next of kin, Held, that there was an equitable conversion of the real estate into personal property; that the title to it vested in the trustees absolutely; that the devise was limited by two lives in being, constituted a valid method by which the trustees might work out and provide a private charity, and was not void for the indefiniteness of the beneficiaries. That chapter 360 of the Laws of 1860, forbidding a testator to give under certain circumstances more than one-half of his estate to certain corporations and associations, had no application, as that statute applied only to the corporations and associations which were incorporated under that act.

2. **Same — Chapter 360, Laws of 1860.**

Relatives, not named in chapter 360 of the Laws of 1860, could not avail themselves of the act, although its application would benefit them.

3. Same — Validity — Indefiniteness of beneficiary.

That the provisions of chapter 701 of the Laws of 1893, taken in connection with the Real Property Law (Laws of 1896, chap. 547, § 93), and enacting, in substance, that a gift should not fail for the indefiniteness or uncertainty of the beneficiaries, supported the validity of the devise.

ACTION for construction of will. The facts appear in the opinion.

W. G. Tracey, for plaintiff.

A. C. Stevens and George R. Cook, for defendants, trustees and executors.

Frank Hiscock, for defendant, the Attorney-General.

C. Carskadden, for defendant S. B. Breese.

Brooks & Walrath, for Syracuse University.

Charles C. Cook, for defendants, Syracuse Home Association, Hope College and Onondaga County Orphan Asylum.

Charles E. Stevens, for First Reformed Dutch Church, of Syracuse, and Henry D. Mulford.

M. E. and G. W. Driscoll, for St. Joseph's Hospital.

Sutphen & Lefferts, for General Synod, etc.

G. D. Chapman, for other defendants.

SCRIPTURE, J. This action was brought by the plaintiffs, who are the only heirs-at-law of Nathan F. Graves, deceased, for the construction of the last will and testament of said deceased, and all questions relating to the construction of said will can therein be properly adjudicated.

The executors intended to bring an action for the construction of said will, but were not quite ready to do so at the time of the commencement of this action.

Nathan F. Graves, an old resident of Syracuse, New York, died July 21, 1896 (at the age of about eighty-three years), leaving

no descendants him surviving, but leaving Catherine H. Graves (who at the time of his death was about eighty-five years of age), his widow, and the plaintiffs, his only heirs-at-law, and next of kin.

He left a will drawn by himself, bearing date September 15, 1893, proved in the Surrogate's Court of Onondaga county, September 5, 1896, and on the same day letters testamentary were issued to Charles E. Stevens and Maurice A. Graves, two of the executors and trustees named in said will; Rasselas A. Bonta, an executor and trustee therein named, having renounced as executor, but not as trustee.

The executors believe that all of the legacies and devises under said will are valid, except the one to Helen A. Graves, who died in the lifetime of the testator.

The personal estate of the testator was appraised at about $88,000.

The real estate of the testator is probably worth $100,000, more or less, and about which there is an action in the Supreme Court pending and undetermined, involving $40,000 or $50,000, it being claimed on the part of said executors that the same is a part of the testator's estate, and on the part of the committee of Catherine H. Graves (the former owner), that the same doth belong to her.

The testator was a lawyer by profession, and had practiced law more or less until his death, but was not actively engaged in his profession during the last twenty years of his life, but had an office in the front room of the New York State Banking Company (of which bank he was president for about forty years), and transacted such law business as he did in such office.

The testator, by his will, has appropriated for his own benefit, or bequeathed to corporations, societies and associations, about $28,000 (no part of which has been paid).

Twenty-two thousand dollars to relatives and friends.

The use of his bank stock (between $20,000 and $30,000) he bequeathed to his wife for life, and the same forms a part of his residuary estate.

And the balance of his property to Charles E. Stevens (a nephew and former law partner), Maurice A. Graves (a nephew), and Rasselas A. Bonta (who had been the cashier of his bank for towards forty years), in trust, to found, erect and maintain a home to be known as "Graves Home for the Aged."

The defendants, Charles E. Stevens, Maurice A. Graves and

Rasselas A. Bonta, are the trustees named in the tenth paragraph of the will of Nathan F. Graves, late of the city of Syracuse, deceased, and Charles E. Stevens and Maurice A. Graves are also the acting executors of such will. By the tenth subdivision of such will, the testator gives and devises unto all such trustees all the residuum of his estate, in the following words: "I give, bequeath and devise all the rest and residue of my property of every kind, personal and real, wherever situate, to my trustees hereinafter named, for the purpose of founding, erecting and maintaining Graves Home for the Aged, to be located in the city of Syracuse, in the state of New York. It is intended as a home for those who, by misfortune, have become incapable of providing for themselves and those who have slender means of support. The institution to be known as Graves Home for the Aged. I hereby appoint Charles E. Stevens, Rasselas A. Bonta and Maurice A. Graves for the trustees to execute the above trust. I hereby authorize and empower my executors, or the survivor of them, to rent or sell any part or all of my real estate that I may own at the time of my death." Then follows an authority to the trustees to convey, in substantially the same words. And the eleventh subdivision of the will reads as follows: "My executors or my trustees are authorized to retain my stock and shares in the New York State Banking Company, and continue the business of banking for a term of years, at their discretion, but the same is not to be continued nor any portion of my property held longer than the lives of Catherine Graves Roby and Helen Breese Graves."

It is claimed by the plaintiffs that this portion of the will is void by reason of the indefiniteness of the trust and the uncertainty of the beneficiaries, and that it violates the rule against perpetuities.

The plaintiffs ask for the construction of the will principally upon two questions:

First. Is the residuary devise and bequest by the testator to the Graves Home for the Aged invalid, claiming it is void, and that the plaintiffs are entitled to all the real estate of the deceased, and all the personal property remaining after the payment of valid legacies, and subject to any share the widow may be entitled to therein.

Second. Whether in case the devise and bequest to the Graves Home for the Aged is valid, such devise or bequest to trustees to found such home falls within the statute of 1860, claiming that it does.

These defendants claim that the above constitutes a perfectly valid trust under the laws of this state, and they base such claims on two grounds, first, two recent statutes, chapter 701 of the Laws of 1893, and chapter 547 of the Laws of 1896; and, second, irrespective of such statutes, on the authority of the case of Burrill v. Boardman, 43 N. Y. 254, and the doctrine therein set forth, and which is hereafter fully set forth.

Before considering the effect of the Laws of 1893 and 1896 upon gifts for charity, the history of that law in England and all of the states of the Union, including New York, with the powers of the English Court of *Chancery* and the *cy-pres* doctrine should be considered.

The original and inherent jurisdiction of courts of equity in the different states, and the source from whence their *cy-pres* powers are derived, should also be examined; to the end that the true intent of the legislature may be arrived at, and from what source or sources and principles the framers of the law created the act.

Based upon certain prerogatives of the crown and the statute of 43 Elizabeth, chapter 4, the Court of Chancery in England exercised a peculiar jurisdiction over charitable trusts, in determining and applying gifts to charity, where the donor had failed to define them, and in framing schemes of approximation near to or remote from the donor's true design. Where, therefore, there was a gift for a general and indefinite charitable purpose, either the king, under his sign manual, or the court representing him, disposed of the subject donated.

"The distinguishing features of this class of trusts as administered in England, from an early period, were that they might be established through trustees, who might consist either of individuals or a corporation, and in the case of individual trustees they might hold an indefinite succession and be self-perpetuating, and the funds might be devoted in perpetuity to the charitable purposes indicated by the donor, while private trusts were not permitted to continue longer than a life or lives in being and twenty-one years and a fraction afterward. The persons to be benefited might consist of a class, though the individual members of the class might be uncertain. The scheme of the charity might be wanting in sufficient definiteness or details to admit of its practical administration, and in such cases a court of equity would order a reference to a master in chancery to devise a scheme for its adminis-

tration which should as nearly as possible conform to the intentions of the founder of the charity, and thus was called into operation what was known as the *cy-pres* doctrine. These charitable trusts were regarded as matters of public concern, and were enforcible by the attorney-general, although in many cases the court would compel their performance without his intervention at the instance of a town or parish, or of its inhabitants, or of an individual of the class intended to be benefited, such as one of the poor, or maimed," etc. Opinion of the court, per Rapallo, J., Holland v. Alcock, 108 N. Y. 324.

It was well said in Vidal v. Girard Executors, 2 How. (U. S.) 127, and Price v. Maxwell, 28 Penn. St. 23, speaking of trusts for charitable uses, " Whatever is given for the love of God, or for the love of your neighbor, in the catholic and universal sense, given from these motives, and to these ends, free from the stain or taint of every consideration that is personal, private or selfish," is a gift for charitable uses. But a condition that the donor's name shall be attached does not invalidate it as a legal charity. Miller v. Porter, 53 Penn. St. 292.

It was at one time supposed that trusts for charitable uses arose from the provisions of the statute of 43 Elizabeth, chapter 4, known as the Statute of Charitable Uses, which enumerated many which were directed to be enforced, but the design of this and several prior statutes was merely the restoration and encouragement of the charitable institutions which had been abolished by earlier statutes. Perry on Trusts, § 692.

The English Court of Chancery, earlier than the enactment of this statute, has often exercised jurisdiction over the trusts, not from the statute, but independently of it. Vidal v. Girard, *supra.* It is now generally settled that courts of equity have an original and inherent jurisdiction over charities though the English statute is not in force.

It is believed that at the time of the passage of the Law of 1893, chapter 701, that in every state of this Union, except Maryland, North Carolina, New York, Virginia and Wisconsin, courts of equity have *cy-pres* power and jurisdiction over trusts for charity. In some of the states the statute of 43 Elizabeth, chapter 4, has been adopted, while in others the principles of the statutes have been adopted and constitute part of the law of the state. In some of the states the Court of Chancery has jurisdiction by virtue

of its original common-law power, without claiming prerogative powers or invoking the aid of the statute.

The statute of Elizabeth was repealed by the state legislature in 1788, and the prerogative of the crown had, of course, no effect in this state; but the powers and jurisdiction of the English Court of Chancery, as they existed in England at the time of the Revolution, were supposed to have followed and remained with courts of equity in this state; and the law of charities, it was claimed, independent of the statute of Elizabeth, was in force prior to that statute, and continued after its abolition.

It was also held that the provisions of the Revised Statutes relative to restriction on alienation generally, and to accumulations of personal property and of expectant estates, did not affect property given in perpetuity to religious or charitable institutions. Williams v. Williams, 4 Seld. (8 N. Y.) 527; Owens v. Missionary Society, 14 N. Y. 380; Beekman v. Bonsor, 23 id. 298.

In Williams v. Williams, it was considered by the Court of Appeals, that the law of charity was, at an early period in English judicial history, engrafted upon the common law, and that it existed irrespective of the declaratory statute of Elizabeth which was afterwards repealed. The proceedings, under that statute, were considered of an exceptional nature, applicable to existing gifts, and not to the exercise of a general jurisdiction of the courts over charitable gifts; which, consequently, remained unimpaired on the abolition of the statute.

It was held in Beekman v. Bonsor, 23 N. Y. 298, that, as a general rule, charitable trusts are subject to the rules which appertain to trusts in general; among others, that the trust must be capable of execution by a judicial decree, in affirmance of the gift as the donor made it; and, consequently, that a charitable gift of a sum which is left uncertain, or which is left to the discretion of executors who have renounced the trust, especially where the objects to be benefited are not especially designated, was void.

That the English common law on the subject could only be considered as in force here so far as it is adapted to our political condition, and capable of administration in the exercise of strictly judicial power, inasmuch as our courts are clothed only with an expressed judicial authority, and do not act as exponents or ministrants of a governing power.

In the cases of Levy v. Levy, 33 N. Y. 97, and Bascom v. Albertson, 34 id. 584, it was held that the Statute of Charitable

Uses was repealed by statute in 1788, and with it the whole system of charitable uses, and that trusts for charities must be as definite as private trusts, and that indefinite charitable uses must be administered according to the statute of the state, and that all gifts for such uses are subject to the provisions of the Revised Statutes in relation to uses and trusts, perpetuities and the limitations of future estates.

The *cy-pres* power of the English Courts of Chancery was definitely held not to have any existence in the jurisprudence of this state in Holland v. Alcock, *supra*, and that trusts for charitable purposes formed an established exception to the law against perpetuities, as it existed before the Revised Statutes, and that it was not the intention of the legislature in reversing the branch of the law relative to perpetuities to abolish that feature of the law of charities, which allowed the income of property to be perpetually devoted to charitable purposes.

The trend of decisions up to the passage of the Law of 1893, chapter 701, and the Real Property Law, chapter 547 of the Laws of 1896, section 93, are to the effect that courts of equity had no *cy-pres* powers; that gifts to individuals as trustees in perpetuity; to unincorporated associations; to corporations not expressly authorized by charter or statute to take; or for uncertain undefined or indefinite uses; or for the use of undefined or indeterminate beneficiaries, and not limited to take effect within the statutory period; all were invalid. Read v. Williams, 125 N. Y. 560; Wilcox v. Gilchrist, 85 Hun, 12; Prichard v. Thompson, 95 N. Y. 76; Tilden v. Green, 130 id. 29; Fairchild v. Edson, 77 Hun, 298; Gross v. Moore, 141 N. Y. 559; Goddard v. Pomeroy, 36 Barb. 546; People v. Powers, 147 N. Y. 104; White v. Howard, 46 id. 144; Matter of O'Hara, 95 id. 403; Rose v. Hatch, 125 id. 427; Fosdick v. Town of Hempstead, 125 id. 581; Jennings v. Conboy, 73 id. 230.

"The characteristics of a charitable use before the Revised Statutes were indefiniteness and permanence; indefiniteness, in that the trust was for the benefit of a class or the public and not for a particular person; permanence, in that the rules relating to perpetuities had no relation to charity unless the execution of the charity was postponed.

"Limitations, settlements or gifts, intended to benefit the public or which have some educational, benevolent, charitable, or religious end, usually present two characteristics; they are

permanent in operation and they are indefinite or uncertain in respect of the real or individual beneficiaries." Fowler on the Law of Charitable Uses, 1896.

The Revised Statutes abolished all uses and trusts in real property not therein authorized, and among others, trusts and uses for charitable purposes. Riker v. Leo, 115 N. Y. 93.

This statutory abrogation of all trusts except the four classes specified in the statute does not apply to personal property trusts. Holmes v. Meade, 52 N. Y. 332.

In personal property, trusts may be created for any purpose not in its nature improper. But in so far as any trust in personal property affects suspension of the absolute ownership, it falls within the operation of the statute forbidding such suspension beyond two lives in being. Barry v. Lambert, 98 N. Y. 300; Genet v. Hunt, 113 id. 158; Fowler on Charitable Uses, 97.

The Revised Statutes permitted the creation of powers in trust for any purpose not contrary to law, but prohibited an undue suspension of the power of alienation.

The Revised Statutes did not provide specifically the term for which a trust may be created, except in few instances which are not important here. The Real Property Law provides that every express trust ceases when its purpose ceases.

The only other statutes bearing on this subject are those which deal with suspension of the power of alienation or of ownership beyond a specified term.

Briefly stated, the law of charitable uses contemplated permission of an indefinable class of beneficiaries; an unlimited term; and that they were entirely abolished, as to real and personal property, and whether under trusts or powers, but certain quasi-charitable trusts and powers could still be created, restricted, in cases of suspension, to the statutory term, and in all cases to the benefit of persons who might be very numerous but must be definitely ascertained; and the particular purpose of these quasi-charitable trusts was restricted, in real property, by the terms of the statute specifying the purposes authorized, and in personal property, or under powers, to any purpose not contrary to law; and that the only method (with a few statutory exceptions like the Shaker trusts) provided by law for accomplishing a similar end, without a time limit or a definite description of the individuals who might ultimately and directly secure a benefit, lay in the system of corpora-

tions chartered for charitable purposes. Bird v. Merklee, 144 N. Y. 544.

The legislature had taken away, and the legislature might give again the power to create charitable uses, untrammeled by these restrictions. Some such exceptions were from time to time created.

The will of Mr. Graves does not provide for the formation of a corporation or society by said trustees, and the conveyance of the property to it. It expressly provides for the founding, erecting and maintaining the charity under his name, to be known as "Graves Home for the Aged," and appoints the trustees to execute the trust; they are not directed to incorporate a society or corporation to do it, conveying thereto the estate they take under the will, but they are to execute it. The title to the property devised to the trustees vested absolutely in them free from any charges on the death of Mr. Graves. The charge of the payment of income of certain real and personal estate did not suspend the vesting of the title of the estate in them until her death. The eleventh clause of the will expressly provides that no portion of his property shall be held longer than the lives of two persons in being named.

The Statute of Perpetuities is in no way violated. Numerous cases have held devises for charitable purposes invalid which directed the incorporation of a company to take title and administer the charity, which of necessity could not be done within the lives of two persons in being, "one vice in all these cases was that by force of the limitations created the ownership was left 'swinging in abeyance' doubtful of its direction and ultimate resting place, and this for a period longer or shorter and not measured by lives in being." Opinion by Finch, J., 113 N. Y. 337.

"It seems that the nonexistence, as a corporate body, at the time of a testator's death, of an institution intended by him as an object of his bounty, will not alone defeat a testamentary gift. If no such limit is fixed to the time of incorporation, but is left dependent upon the will of the legislature, the gift is void." People v. Simonson, 126 N. Y. 299.

The case that resembles the one at bar is Burrill v. Boardman, 43 N. Y. 254. It was an executory bequest to trustees for the establishment in the city of New York of a hospital for the reception of sick and diseased persons, and for its permanent endowment, directing the trustees to apply to the legislature for proper

acts to incorporate, secure and perpetuate said hospital. The will further provided that in the event the legislature refused the charter within two lives in being at his decease, that the trustees, from time to time, pay over the bequests that may come into their possession to the United States, etc. This executory bequest was held good on the same principle as a devise for the benefit of an unborn child.

"The testator does not only declare his intention to give to a person not *in esse*, but is actually giving directions for the creation of that person; and there is no difference between the cases, but that one is an executory trust for a natural person, to be created, and the other is a political person to be created." Attorney-General v. Downing, Wilmont's Opns., p. 16; Burrill v. Boardman, *supra.*

The testator, in the case of Power v. Cassidy, 79 N. Y. 602, gave the residuum of his property to his executors to be divided by them among such Catholic charities and churches, etc., in the state of New York, as the majority of his executors should decide, and in such proportions as they should think proper. This will was sustained, and it was held that by the terms of the will there was an equitable conversion of the testator's real estate into personalty.

The principles held in the case cited were approved in People v. Powers, 147 N. Y. 104. The courts have built up on the ruins of the Williams case a system or rule of law holding that if a man desires to leave his real property to charity, he can only do so through a corporation, making his bequest to a corporation entitled by its charter to receive and hold the gift for charitable uses, or he must provide by his will for the creation of a corporation, with power to take the gift within the time limited by the statute against perpetuities.

"When the gift to a charitable use is so indefinite as to be incapable of being executed, the representatives of the donor must prevail over the charity."

Williams v. Williams, *supra*, is the only case which defines the trusts that are and are not capable of execution by judicial decree.

Judge Denio says, on page 549: "The cases in which the intervention of the king is required are very different. The rule upon this subject is laid down with precision by Sir William Grant, in Ommanney v. Butcher, 1 Turn. & Russ. 260. 'The law upon cases of this sort,' he says, 'is now reduced to very clear and distinct principles. Where there is a *general, indefinite charitable*

purpose, not fixing itself upon any particular object, the disposition is in the king by the sign manual; but where the gift is to trustees, with general, or some objects pointed out, the court will take upon *itself* the execution of the trust.

" ' If he (the executor) is not to take for his own benefit, the consequence is, that if a particular object, *as the erection of a school*, or even a general object, providing it can be seen what the purpose is, is pointed out, *the court* will execute the trust; but if there is an absence of discretion in individuals, and the object to which the fund is to be applied is of a general indefinite nature, the law casts the application of the fund upon the king as *parens patriae*. The gift in that case was of a residue, to be given in private charity.' In Moggridge v. Thackwell, 7 Ves. 36, the same doctrine is laid down by Lord Eldon. The will, in that case, gave the residue to an individual, ' desiring him to dispose of the same in such charities as he shall think fit, recommending poor clergymen who have large families and good characters.' Lord Thurlow had decided that this was sufficiently definite to be executed by the court, and Lord Eldon affirmed the decree on a rehearing. In Cary v. Abbott, id. 490, the bequest was for the education of poor children in the Roman Catholic faith, which, by the law of England, was illegal, and the master of the rolls decreed that the fund should not go to the next of kin, but to such charitable purposes as the king, under his sign manual, should appoint. See, also, Reeve v. Attorney-General, 3 Hare, 191; 2 Story's Eq. Juris., § 1190. It is only where the *purpose* is indefinite, as in the case of a gift for charity generally, or has become impracticable on account of the death of a party who was to select the object, or is illegal, as in the case last referred to, that the aid of the crown is required."

One of the results of the decisions built up on the ruins of the Williams case was, that the courts would not permit a willing trustee to carry out the benevolent and charitable purposes of the testator.

The common-law courts knew no such thing as a trustee when the legal title was vested where they supposed the beneficial enjoyment to be. A trustee is a creature of equity, and when he becomes vested with the legal title under a valid will, the trust expressed by the testator fails. The only way in which the benefit of the property could be given to the representatives of the testator was by a court of equity creating in the heirs and next of kin an equitable interest, or equitable estate as it is called, and

thus decreeing a resulting trust. Now, then, the very nature of a resulting trust, the principles upon which they arose was either to carry out the intentions of the testator or grantor, as the case might be, or to prevent the unjust enrichment of the person holding the legal title. They arise when property has been conveyed or willed upon trust, and either, through inadvertence, no beneficiary is named, or if named is not in existence, or, refuses the gift, or else that the trust created is illegal or against public policy. In the one case it is impossible for the trustee to carry out the trust, and, in the other case, the law says that, since the trust is against public policy, in no event will we allow the trustee to carry out the trust. Hence it is seen in either case for the trustee to keep the property would be manifestly unjust, he would be unjustly enriching himself. Why? Because the giver of the property by declaring the gift to be in trust has clearly indicated his intention that the trustee shall not have it himself, and since it is absolutely impossible to give it to the persons whom the testator meant should have it, it is eminently just that it should be returned to the heirs and next of kin by means of a resulting trust, in order to prevent the unjust enrichment of the trustee.

Now, in the case of a charitable trust, where the trustee is willing to execute the trust, according to the confidence imposed in him by the testator, nothing of the kind happens. It would be a travesty on justice to say that a charitable trust, such, for instance, as to A. B. for the purpose of educating such poor children as he should select, was against public policy. To say that it would be impossible for the trustee to carry out the trust, if left alone, would be to say that he was void of ordinary intelligence. The testator has created no equitable interest in his heirs and next of kin, in fact he has indicated his intention that they should not have his property. He has vested in the trustee a personal confidence, and as long as the trustee is willing and anxious to carry out the intentions of the testator, and is not in any way trying to unjustly enrich himself, there is no occasion for the court to *create* an equitable estate in the heirs and decree a resulting trust.

The effect of refusing to allow a willing trustee to carry out a trust is described by Professor Ames, of Harvard Law School, as follows: "In the one case, where the will of the testator cannot be carried out, equity, by interfering, prevents the unjust enrichment of the trustee at the expense of those better entitled. In the other case, where the will of the testator can be ful-

filled (*i. e.*, a charitable trust), equity, by interfering, defeats his will and thus produces the unjust enrichment of the testator's representatives, at the expense of the intended beneficiaries. In the one case, the impossibility of performing the express trust gives rise to an *equitable constructive trust.* In the other case, an *inequitable constructive* trust is what causes the impossibility of performing the express trust. Surely a strange perversion."

But it is argued that it is the essence of a trust that there should be a beneficiary capable of coming into court and demanding the execution of the trust.

This is all very well when it comes to enforcing the execution of the trust; if the trustee refuses to carry out the intentions of the testator, then he is trying to unjustly enrich himself, and the court not being vested with any discretionary power by the testator, if it cannot ascertain the beneficiaries, may rightly and on principle decree a resulting trust.

Is the above not exactly what the courts of this state have done in that class of cases (hereafter more fully referred to), where a testator has made a bequest to a corporation to be devoted to a particular object, as the support of the poor? The courts hold that no matter how indefinite the ultimate beneficiaries, if the corporation has the corporate power to perform the thing designated, that the bequest is perfectly valid, and that there is really no trust. Adams v. Perry, 43 N. Y. 487; Wetmore v. Parker, 52 id. 450; Le Couteulx v. City of Buffalo, 33 id. 333.

The most recent case of this class is Bird v. Merklee, 144 N. Y. 544, where the testator gives his property to certain churches for the purpose of buying coal for the poor of such churches. Suppose that one of these churches, by its charter, also had the corporate power of running a base ball park, or to make an extreme case (extreme cases best illustrate a principle), of carrying on a race course, and should apply the money given for the purpose of training horses, would the courts still say that there was really no trust? I think in common justice they would say that the corporation was unjustly enriching itself, and if the courts could not ascertain the beneficiaries would then decree a resulting trust. Why should not a bequest to a trustee for a specific purpose, where the rule against perpetuities is not violated, and the trustee is willing to execute the trust, be held valid as well as a bequest to a corporation for a specific purpose?

A trust of personal property is not within the Statute of Uses and Trusts, and may be created for any purpose not forbidden by law. Gilman v. McArdle, 99 N. Y. 451, and see cases heretofore referred to on trusts and uses in personal property.

I am inclined to regard the trust in this case at bar as a trust of personal property, and the directions of the testator for the sale amounts to equitable conversion for the purpose of paying debts and legacies and the founding of Graves' Home for the Aged, and a full execution of the charity. It is evident that the personal property is not sufficient to pay the debts, legacies and expenses of administration. The property must be treated as personal for the purposes of the trust; first, the will directs the sale of it; and second, necessity demands the conversion. Asche v. Asche, 113 N. Y. 232; Delafield v. Barlow, 107 id. 535; Dodge v. Pond, 23 id. 69; Power v. Cassidy, 79 id. 602; Lent v. Howard, 89 id. 169; Fraser v. Trustees, 124 id. 479; Shipman v. Rollins, 98 id. 326.

I am unable to find a single authority in the courts of this state holding, or even intimating, that a testator cannot, through private individuals and friends, selected as trustees (giving and devising to them the absolute title), work out and provide a private charity to the same extent and in all respects as valid as a devise to a corporation or to trustees to convey to the same for charitable uses, within two years after the testator's death, provided two lives named in his will should continue so long.

The title of the property vested absolutely in the trustees, free from any charges, upon the death of Mr. Graves; his will does not violate the statute against perpetuities, and does not contravene any statute of the state as to corporations, associations and societies entitled by their charters to take and receive gifts for charitable uses.

It is the duty of the court to harmonize and retain as far as possible all the provisions of the will; to reject no words of the maker, except upon imperative necessity, and to seek for all of them some force and operation.

The court may punctuate, and add, omit, or substitute words, in order to give effect to the actual intention appearing from the instrument as a whole, as by adding commas and relative pronouns; changing "and" to "or," correcting plural into singular, transposing, inserting and omitting. Crooke v. County of Kings, 97 N. Y. 421 (434); Fraser v. Trustees, 124 id. 479; Roe v. Vingut, 117

id. 204; Weeks v. Cornwell, 104 id. 325; Mott v. Ackerman, 92 id. 539; Starr v. Starr, 132 id. 154.

Where a testator's object is unworthy or commands the just condemnation of the court, it will not strain to support its plan. Matter of Paton, 111 N. Y. 480; Greene v. Greene, 125 id. 506.

But apart from this objection it endeavors to find a way of upholding the will, and to effectuate it through some legal channel of construction, if any be open. Greene v. Greene, *supra;* Locke v. Farmers' L. & T. Co., 140 N. Y. 135; Terry v. Wiggins, 47 id. 512; Duclos v. Benner, 136 id. 560.

In aid of a construction which would give validity, testator may be presumed to have known the law and intended that meaning. The law favors a construction that will avoid intestacy. Chwatal v. Schreiner, 148 N. Y. 683.

I am of the opinion that the devise and bequest for founding "Graves' Home for the Aged" is valid, independent of the remedial acts of 1893 and 1896.

The plaintiffs claim, that if the devise and bequest to "Graves' Home for the Aged" is valid, then such bequest falls within the statute of 1860, and that the testator's wife and plaintiffs are entitled to receive all of the property in excess of one-half part thereof, which the corporations and associations named in the acts can hold in trust or otherwise.

A testator having wife, child or parent was not prohibited by chapter 319 of the Laws of 1848, and chapter 360 of the Laws of 1860, from giving his entire estate to other corporations and associations not named in those acts or to other individuals.

In Harris v. Slaght, 46 Barb. 504, Johnson, J., speaking: "But the restraint is only against the corporations of a specified character or description, and not even corporations generally. And as respects individuals, there is no restraint whatever. There is nothing whatever in the provisions of this act (referring to chapter 319 of the Laws of 1848) to prevent a testator thus related, from giving his entire estate to other corporations or to other individuals."

In the Matter of Crane, 12 App. Div. 276, the court says: "The point is also taken that the bequest to the city conflicts with the provisions of chapter 360 of the Laws of 1860, prohibiting the gift by a testator, under certain circumstances, of more than one-half of his estate. But this act only applies to benevolent, charitable, literary, scientific, religious or missionary societies;

in other words, to a particular class of private corporations. It does not apply to the state nor to individuals, nor to public or municipal corporations."

In Hollis v. Drew Theo. Sem., 95 N. Y. 166, Judge Earl says: "The general rule is that one may do with his property as he pleases. He may dispose of it by will in any way that suits his fancy or his judgment. He may give it all to strangers and thus disinherit his relations. He may give it all to natural persons or to corporations capable of taking. He may give it directly or create trusts which the law allows, and this general power of disposition he possesses down to the last hour of conscious, intelligent existence."

The statute of 1860 does not include devises to individuals or devises to the Supreme Court.

The counsel for the executors makes the further point, that the law of 1860, naming certain near relatives, was passed for the sole benefit of those persons named, and that relatives or heirs, not named in the law, although they would benefit by its application, have no right or standing in court to insist on its enforcement. After a careful examination of the decisions, and particularly of the recent case of Amherst College v. Ritch, 151 N. Y. 333, we are of the opinion that he is fully justified in his contention.

The will should also be sustained under the remedial acts. The Supreme Court, besides its original jurisdiction over trusts, is given by the acts in question control over gifts for charitable or benevolent uses and the *cy-pres* powers of the English courts are adopted and conferred upon it, in some respects.

Laws 1893, chap. 701, "§ 1. No gift, grant, bequest or devise to religious, educational, charitable, or benevolent uses, which shall, in other respects be valid under the laws of this state, shall or be deemed invalid by reason of the indefiniteness or uncertainty of the persons designated as the beneficiaries thereunder in the instrument creating the same. If in the instrument creating such a gift, grant, bequest or devise there is a trustee named to execute the same, the legal title to the lands or property given, granted, devised or bequeathed for such purposes shall vest in such trustee. If no person be named as trustee then the title to such lands or property shall vest in the Supreme Court.

"§ 2. The Supreme Court shall have control over gifts, grants, bequests and devises in all cases provided for by section 1 of this

act. The attorney-general shall represent the beneficiaries in all such cases, and it shall be his duty to enforce such trusts by proper proceedings in the court." (Not repealed in 1896.)

Real Property Law, chap. 547, " § 93. A conveyance or devise of real property for religious, educational, charitable or benevolent uses, which is in other respects valid, is not to be deemed invalid by reason of the indefiniteness or uncertainty of the persons designated as the beneficiaries thereunder *in the instrument making such conveyance* or *devise*. If in such instrument a trustee is named to execute the same, the legal title to the real property granted or devised shall vest in such trustee. If no person is named as trustee, the title to such real property vests in the Supreme Court, and such court shall have control thereof. The attorney-general shall represent the beneficiaries in such cases and enforce such trusts by proper proceedings."

The statute is to be construed so as to carry out the intention of the legislature, though it seem contrary to the letter. A thing that is within the intention of the makers of the statute is as much within the statute as if it were within the letter; and a thing which is within the letter of the statute is not within the statute unless it is within the intent of the makers. Jackson v. Collins, 3 Cow. 89; Smith v. People, 47 N. Y. 330; Riggs v. Palmer, 115 id. 506.

Where the legislative intent is manifest, the letter of the statute must, upon the most familiar rules of construction, yield to the spirit; and if remedial in its nature, it should be liberally construed, with a view to the beneficial ends proposed. Murray v. N. Y. C. R. R. Co., 4 Keyes, 274, 128; Hudler v. Golden, 36 N. Y. 446.

By the Revised Statutes all uses and trusts in real property not therein authorized were abolished. Among those not thus authorized were all those for charitable purposes. The statute permitted the creation of powers in trust for any purpose not contrary to law; but at the same time prohibited any employment of them to effect an undue suspension of the power of alienation.

The legislature had taken away, and the legislature might give again, the power to create charitable uses and untrammeled by these restrictions. For example, in R. L., chap. 60, § 4 (1813), both real and personal property might be held for the use of an unincorporated religious society.

Corporations under the act of 1860, chapter 360, could take

gifts and devises in trust or otherwise. Trusts for common schools in perpetuity were allowed and the trusts were not invalid for want of a trustee or donee.

Trusts for the benefit of "Friends." Laws of 1878, chap. 209; also Laws of 1880, chap. 337.

Also, the Membership Corporations Law, under which almost any kind of a charitable institution can be formed. The English system in relation to charitable trusts and uses was overthrown in this state by legislative enactment, and not from the nature of things, or of the condition of our institutions or form of government.

The legislature having the right to divest the courts of the state of the *cy-pres* powers of the English chancery courts, it could reinvest them with those powers and control over gifts for charitable purposes; it could re-enact the statute of Elizabeth or create a new statute so that a testator could devise his property to individuals or corporations, or both, for charitable uses.

The counsel for the plaintiffs contends that the gift for founding "Graves' Home for the Aged" is void, and that the remedial act of 1893 has reference only to the indefiniteness or uncertainty of the beneficiaries named in the will, and that all gifts for such uses are still subject to the provisions of the Revised Statutes in relation to uses and trusts, perpetuities and the limitations of future estates. In other words, the gift must be valid under the laws of this state, and if it is it will not be deemed invalid if the beneficiaries are indefinite and uncertain.

In my opinion such a construction would defeat the beneficial purpose of the act. It was not the design or intention of the framers of the law to only relieve gifts or grants to charity when the beneficiaries were indefinite or uncertain, but they intended to embrace within the act all gifts for charitable uses whether to corporations or individuals.

Gifts for charitable uses to corporations were valid and did not offend the Statute of Perpetuities, and grants to them were equally valid. Public policy did not demand, from the condition of the law relating to charitable trusts and uses, a further enactment as to them.

The legislature fully realized that the community had suffered by defeating the real intention and design of charitably disposed persons more than could possibly accrue from a more humane and liberal policy towards such uses. The books were full of cases ex-

hibiting curious instances of varying opinions in the judicial mind. The cases where the worthy givers to noble and benevolent objects and uses, were legion, but before they could find their final resting place the ultimate designs of the donors were frustrated and defeated, because the gifts offended the unyielding rules of law.

The creators of this act knew that the great majority of those who had been inclined to amass fortunes large or small, to be devoted to charitable purposes, and who have labored with that end in view throughout a long life, do not want to leave it to institutions founded and established by others; but prefer to have the charities bear their name and remain a lasting monument to their memories or to support a certain class of persons who are the direct objects of their charity. The makers of the statute knew that very many charitable trusts failed because they were incapable of being executed by judicial decree, and in some cases even where the trustees were willing to execute the trust. (Can a corporation execute a discretionary power better than an individual?) They were aware of the numerous cases of gifts to individuals as trustees in perpetuity, and of the indefiniteness and uncertainty of the persons designated as beneficiaries in the gift or grant, whereon the Statute of Perpetuities was impressed, and how they fell, as violative of the Statute of Uses and Trusts in real property and powers in trust and from an undue suspension and limitation. There has been hitherto no judicial construction of the full scope and meaning of these remedial acts.

In People v. Powers, 147 N. Y. 104, an action in relation to a trust where the testator died in 1882, it was held that it failed because the beneficiaries were indefinite and uncertain, and that the provisions of the will must be considered under the law as it existed at the death of the testator, and, consequently, not affected by chapter 701 of the Laws of 1893.

But in Dammert v. Osborn, 140 N. Y. 43, it is said: "There is another and more recent statute, that has some application to this case, and it is the last expression of the legislative will on the subject, and discloses what our public policy is in regard to such bequests. By chapter 701 of Laws of 1893, entitled 'An act to regulate gifts for charitable purposes,' it is enacted that no such gift, when valid in other respects, under the law of this state shall be deemed invalid by reason of the indefiniteness or uncertainty of the persons designated as the beneficiaries in the instrument creating

the same. That in such cases when a trustee is named, the title shall vest in him, and if no person is named as trustee, then the title shall vest in the Supreme Court, and in all cases of bequests to charitable uses, where the beneficiaries are not definitely designated, that court shall have full control, and it shall be the duty of the attorney-general to enforce the trust and represent the beneficiaries. This statute indicates an intention on the part of the legislature to enforce and uphold charitable bequests not heretofore recognized as valid, and it may be regarded as the first step in the direction of modifying that body of law which this court has built up on the ruins of the system outlined in Williams v. Williams, 8 N. Y. 525.

"The result which the second division of this court was constrained to reach in a recent case of public importance no doubt had some influence in creating the sentiment which is embraced in the law. * * * When a court of equity obtains jurisdiction, and all the facts are before it, * * * it may, and generally does, adapt the relief to the situation existing at the close of the litigation." Dammert v. Osborn, *supra.*

In the case at bar, the testator drew his will September 15, 1893, died July 21, 1896, and the same was admitted to probate September 5, 1896, and this action was commenced in January, 1897. The remedial act became a law May 13, 1893. The Real Property Law became a law, with the approval of the Governor, May 12, 1896. Section 93 of that act has been referred to and set out in full for the purpose of showing the legislative *will* on the subject of charitable uses.

It must be presumed the testator knew the law and intended to make his gift a valid one within the remedial act. Chwatal v. Schreiner, 148 N. Y. 683.

Bearing in mind, apart from legislative provisions, a court of equity has no power to transfer the legal title from one person to another, by the mere force of its decree.

Also, having in mind the causes and influences, together with the lamentable history of gifts and grants for charitable purposes, we are prepared to examine the statute and find out what it means.

We should consider, first, the title, "An act to regulate gifts for charitable purposes." It assumes to take care of and control all gifts for the purposes specified. What next? "No such gift when valid in other respects *under the laws of this state.*" What laws? Statutory in this act. The legislature refers to laws of its

own creation unless otherwise expressed. A bequest or devise under a will must be by a will valid in its execution and in conformity with the provisions of the Revised Statutes in relation to wills and real and personal property. If, in the instrument creating such a gift, grant, bequest or devise, there is a trustee named to execute the same, the legal title to the lands or property given, granted or devised for such purposes shall vest in such trustees. This plainly shows that the legislature intended, and meant, that the instrument creating the gift must conform to the statute in its execution, and if it does it is valid "under the laws of this state," and by force of the statute uncertainty or indefiniteness of the beneficiaries will not invalidate the gift, and as the act recognizes all gifts for charitable purposes and assumes to regulate their disposition, it embraces every valid gift for such uses.

Section 93 of the Real Property Law provides that the *instrument* making the conveyance or devise of real property which is in other respects valid, omits the words "under the laws of this state."

Reading the two acts together, we are of the opinion, that the legislature refers to the *instrument* creating the gift or devise, and not to the *gift itself*, for all such gifts are valid under the remedial acts. The statute vests the title to the property in the trustee, to execute the same, and if no trustee is named, in the *Supreme Court*, and it gives the court no greater title or control over the trust than the trustee.

Can the Statute of Perpetuities invade the title of the Supreme Court? Can any other statutes passed before the remedial acts in question be impugned upon, and invade that title and control over gifts for charitable uses?

The bequest for founding the home was valid under the remedial act.

The enactment gives to the Supreme Court greater jurisdiction and control over charitable uses than the English courts ever had.

The act is a very great improvement over the English system in relation to charitable uses.

That system was defective wherein it permitted the courts to control the gift not in strict accordance with the donor's true design. It has been supposed by many that these remedial acts have given to the courts the *cy-pres* powers of the English Court of Chancery, and the compilers of the statute have so treated it.

It is true the act is framed and founded upon many of the

principles within those powers and the statute of Elizabeth, yet we are not prepared to hold that the *cy-pres* doctrine has been fully adopted. Judgment is ordered in accord with the findings and decision heretofore made.

Judgment accordingly.

In the Matter of the Estate of SARAH J. BIRDSALL, Deceased.

(Surrogate's Court, Chautauqua County, December, 1897.)

1. **Transfer tax — Mutually acknowledged relation of parent.**

Proof that a childless widow, who died in 1895, took charge in 1882, at the request of their general guardian, of her two orphan nieces, aged respectively ten and five years, at their own residence, which she leased and where she furnished board to them at unusually high rates; that each niece possessed a substantial estate against which, in the case of each, the widow charged every expense; that from 1885 to 1891 she herself was the guardian of the person and estate of each; that, until the marriage of the elder niece in 1890, when she left the widow, all resided together, except during periods spent by the nieces at boarding school, to which they were sent by the widow at their own expense, and that she had never held them out to the public as her children, although she often addressed them as "My dear girls," is insufficient to establish the widow "in the mutually acknowledged relation of a parent" to the nieces, for the term of ten years, necessary to exempt them from paying the transfer tax (Laws of 1892, chap. 399, § 2) upon legacies made by her to them.

2. **Same — Gifts inter vivos, made in contemplation of death.**

Deeds of real property valued at $216,550, executed and delivered to her nieces without consideration, by a testatrix aged seventy-nine, and under the care of a physician for the disease of consumption from which she knew she would never recover, at a period only eight days before her death, are to be regarded as gifts inter vivos, "made in contemplation of the death" of the donor, within the meaning of the Taxable Transfer Act (Laws of 1892, chap. 399, § 1, subd. 3), and the property transferred is taxable; and this although the testatrix had by her will, made a few months previously, constituted the nieces residuary legatees of practically the same property.

Misc.] Surrogate's Court, Chautauqua County, December, 1897.

PROCEEDINGS to determine and fix the transfer tax upon the estate of Sarah J. Birdsall, deceased.

Henry Chase, for executors and residuary legatees.

Walter S. Jenkins, for county treasurer and comptroller.

WOODBURY, S. Mrs. Birdsall executed her last will and testament on the 8th day of June, 1895. She died December 13, 1895, and her will was admitted to probate by a decree of this court on the 2d day of March, 1896. William G. Martin was appointed appraiser under the Taxable Transfer Act, upon application of the executors, and on the 8th day of November, 1897, made and filed his report. On the same day the surrogate heard the arguments of counsel for the respective parties.

After making bequests to the amount of $36,700, upon which all the tax to which the same is liable has been paid, the testatrix bequeathed and devised all the residue of her estate, both real and personal, to her two nieces Margaret I. Baldwin and Sarah J. Peacock. The residue of the personal estate is conceded to be the sum of $5,802.56, and the real estate devised by said will is found by the appraiser to be of the value of $30,441.50.

Eight days prior to her decease, and on the 5th day of December, 1896, the testatrix deeded as a gift real property found by the appraiser to be of the value of $216,550 to her said nieces, the residuary legatees under her will.

It is claimed by the residuary legatees and executors that the personal property passing to the residuary legatees, being less than $10,000 in amount, is not taxable. It is conceded, however, that the aggregate amount of all the personal property passing to the legatees by virtue of the will largely exceeds the sum of $10,000, and, following the Matter of Hoffman, 143 N. Y. 327, which must be regarded as controlling in this matter, it must be held that the same is taxable, although the value of the individual legacies is less than $10,000. The rate of taxation depends upon the relation existing between the testatrix and the residuary legatees, and the determination of the nature of that relationship is one of the main contentions in this case.

The executors and residuary legatees contend,

1. That the testatrix, for not less than ten years prior to the transfer of said property, stood in the mutually acknowledged re-

lation of a parent to the said residuary legatees, and consequently that all the real property transferred to them is exempt from any payment of any tax, and that whatever of any personal property there may be subject to taxation is only taxable at the rate of one per cent.

2. That the real property conveyed by deeds of gift by the testatrix to the residuary legatees prior to her decease was not made in contemplation of death, as that term is employed in subdivision 3 of section 1 of the Taxable Transfer Act, and that in consequence thereof the same is not subject to the payment of any tax.

Now, if it shall be found that the testatrix for not less than ten years prior to the transfer of said property stood in the mutually acknowledged relation of a parent to the residuary legatees then none of the real property which was transferred by the will or by the deeds of gift, prior to her decease, is subject to taxation and the personal property passing by them by virtue of the term of the will is only to be taxed at the rate of one per cent. If, however, it shall be found that this relation did not exist between the testatrix and the residuary legatees, then the personal and real property passing to them by her will is all taxable at the rate of five per cent.; and the real property transferred by the deeds of gift prior to her decease will be taxable at the rate of five per cent., provided it shall be found that the same was deeded in contemplation of death, as that term was employed in the statute to which we have referred.

Thus it will be seen that if this relation did exist, and had existed for the statutory period of ten years, it disposes of the question in this case. It determines that none of the real property transferred by the will, or by the deeds of gift, is subject to taxation, and also fixes the rate at which the personal property, or rather the transfer thereof, is taxable. We will, therefore, undertake to dispose of the question of the relationship first. The father of the legatees died April 8, 1880, and the mother died on the 24th day of June, 1882. At the time of the death of their mother, Margaret was ten and Sarah five years old. The testatrix, Sarah J. Birdsall, was the paternal aunt. She was a widow sixty-four years of age at the death of Mrs. Peacock and has never had any children of her own. About three weeks prior to her death, Mrs. Peacock and these two girls were sick with the measles at their home in Mayville, New York, and the testatrix went there

and cared for them until the death of Mrs. Peacock, and, after her death, continued to stay there and care for these girls until they were taken to Sherman, New York, by one Betsey Harmon, their grandaunt, a few days after the death of their mother. It appears that immediately after the death of Mrs. Peacock a controversy arose as to the custody of these girls. Betsey Harmon, their grandaunt, was appointed guardian of their person by Surrogate Maples of Chautauqua county, and, as we have already stated, took them to her home at Sherman, New York. Then Mrs. Birdsall, being unwilling that Mrs. Harmon should have the custody of these girls, instituted a proceeding in the Supreme Court for the appointment of another guardian for them, and in that proceeding C. P. Skinner, of Westfield, was appointed their general guardian. The order of the court provided, however, that the guardian should permit the relatives of said infants, paternal and maternal, to visit them at all proper times. Immediately upon the appointment of Mr. Skinner as guardian he obtained possession of these girls from Mrs. Harmon after they had been in her custody for about ten weeks, and placed them in the custody of the testatrix at Westfield, New York, where she then resided, and two days thereafter she removed with them to the Peacock homestead at Mayville, New York, which was owned by said infants and where they had formerly resided with their parents, and undertook their care and bringing up. It is a fair inference from the evidence that she entered into an agreement with the guardian that the estate of the infants should bear the burden of their maintenance, and that she was to receive a stipulated price for their board. Upon the other hand, she leased the homestead and paid rent therefor, and continued so to do until the time of her death. In 1885, the testatrix was appointed, by the Supreme Court, guardian of their person and property, and continued to act in that capacity until shortly after the marriage of Margaret, the eldest of the girls, to Alvin T. Baldwin, when, by an order of the same court, made upon application of the testatrix on the 23d day of April, 1891, she was discharged from her trust as such guardian and Mr. Baldwin appointed in her place and stead.

From the time of her going to the Peacock homestead in 1882, the testatrix had the control, care and bringing up of these girls, who were nieces, until the marriage of Margaret in 1890. She looked after them in every way, and superintended their education, both secular and religious. They looked to her for advice and

counsel, and her wishes and judgment were deferred to and followed by them.

During this period of time they all resided together as one family, except that Margaret spent three years, dating from the time she was thirteen years of age, and Sarah spent two years, dating from the time she was nine years of age, at a boarding school in the city of Buffalo, New York, where they were placed by the testatrix, presumably spending their vacation at Mayville with the testatrix. The relationship between them was friendly and affectionate, as would appear from the evidence. The girls were wont to call the testatrix "auntie," and she would often address them as "my dear girls," "dear girls," and the like. They were in the habit of assisting her by doing her errands, helping to care for and nurse her, and aiding her in dressing and undressing when needed. Margaret was married with the approval of the testatrix at the home thus established. After her marriage, which occurred about eight years after she commenced to live with testatrix, she took up her residence with her husband at or near Rochester, New York, and never thereafter resided with testatrix. Shortly after the marriage of Margaret, Sarah went to live with her, and continued to live with her until about two years before the death of the testatrix, when she came back to Mayville and made it her home, as she had theretofore done, with her aunt, the testatrix, until the testatrix died, although spending a good deal of the time with her sister at Rochester, New York. While living with her sister Sarah was attending school, and her vacations, about two months during each summer, were spent with this aunt.

The testatrix rendered and settled her account as guardian, at the time of her discharge, covering the whole period of her guardianship and her accounts are a part of the evidence before us in this proceeding. An examination of these accounts discloses the fact that the burden of the maintenance, support and education of these girls was borne by their estate, and that no part thereof was borne by the testatrix. So far as the evidence discloses these accounts were settled and allowed by the court. The accounts were submitted in evidence as bearing upon the question of the relationship existing between testatrix and these nieces, the residuary legatees.

It appears from these accounts that the testatrix in her capacity as guardian charged against her said nieces all expenditures incurred in their behalf for clothing, sewing and mending, tuition,

school-books, board, pew rent in church, railroad fare, legal services for herself as guardian, etc. She periodically charged and retained her commission upon all moneys received and expended by her as guardian, and regularly charged and retained for their board $7.50 per week for each of them while they were living with her. When Margaret was married her wedding outfit, and the expenses of the wedding, were paid for by the estate and charged against her by the testatrix.

It also appears that when the testatrix resigned her trust as guardian, Margaret was not residing with her, and the fair inference from the petition of the testatrix is that Sarah was not residing with her at that time, but she was residing at Rochester with her sister, and from the petition of Mr. Baldwin, upon which he was appointed guardian for both of the girls, it appears by distinct and direct allegation that both of them then resided at Rochester, New York.

The foregoing are the main facts in this controversy which we regard as established by the evidence taken by the appraiser, and we are called upon to determine whether they established the facts that the testatrix stood in the mutually acknowledged relation of parent to these nieces, her residuary legatees, for not less than ten years prior to her decease, so as to exempt the transfer of the property to them from taxation under section 2, chapter 399, Laws of 1892.

In the disposition of this question we have examined with considerable care the leading cases bearing upon this provision of the statute; among which are: Matter of Wheeler, 1 Misc. Rep. 450; Matter of Spencer, 4 N. Y. Supp. 395; Matter of Nichols, 91 Hun, 134; Matter of Stillwell, 69 N. Y. St. Repr. 381; Matter of Butler, 58 Hun, 400; Matter of Moulton, 11 Misc. Rep. 694; Matter of Sweetland, 47 N. Y. St. Repr. 287.

These cases may be regarded as settling the question of the meaning of the term "mutually acknowledged relation," as that term is employed in the statute, proceeding as they do upon the same general principles of interpretation; but they also demonstrate the fact that the actual existence of such relationship must be ascertained and determined from the facts existing and the circumstances surrounding each particular case.

In the Matter of Butler, 58 Hun, 400-403, Dykman, J., says: "The word 'mutual' in this statute has no abstruse signification. It means and requires reciprocity of action, correlation and inter-

dependence, and finds its best illustration and application in the relations existing between parents and children, which are always mutual."

In the Matter of Nichols, 91 Hun, 134-139, Mayham, P. J., says: "It seems clear to us that the use of the general words (referring to the words, 'mutually acknowledged relation') was intended to embrace a class of persons who, while not in fact sustaining the blood relation of parent and child, had assumed and adopted that conventional relation, by mutually acknowledging it by their method of living, and mutual recognition of that relation for ten years."

The court in this case cites with approval the Matter of Wheeler, *supra*, and also the case of Spencer, 4 N. Y. Supp. 396. In the Spencer case Surrogate Kennedy in the course of an elaborate and exhaustive opinion says: "In this class of cases, to 'acknowledge' means to admit or recognize the existence of parental relations, and the question arises whether this must be done by agreements in writing or by verbal declarations and statements in public, or to each other or in some special manner, or whether the life, acts and conduct of the parties may not of themselves be satisfactory and legal evidence of that acknowledgment which the law requires. We shall hold that it may be established by either or any mode of proof that may satisfy the court. The law in question does not suggest the character of the proof necessary to be supplied, it does not require the acknowledgment to be in writing, or by declarations in public, or to any person or persons; so that if the evidence conclusively shows that the parties understood that their relations were parallel and they thus lived together in this belief, discharging their duties and obligations to each other upon the theory that such relations existed, such manner of life is a mutual acknowledgment of the relation which each sustain to the other."

The learned surrogate in the same case, at page 400, points out how this parental relationship may be established, viz.: by adoption under the statute; by agreement when the person who is to occupy the relation of child is twenty-one years, and lastly, "Where the adult by his conduct and relations to a minor stands *in loco parentis* to him, and thereby has become entitled to the rights and subject to the liabilities of an actual parent. In each of these two cases (referring to adoption and the one now being referred to) as well as in the case of an actual parent, it is their duty to maintain, educate and protect the child during its minority."

Counsel for the residuary legatees also suggest a standard by which this question is to be determined which we think is in general accord with the decisions referred to. He says, "The real question is, did these two nieces stand in the same relation to the testatrix, Sarah J. Birdsall, that they would have stood in if the testatrix had been their own natural mother?" Viewed in the light of the interpretation placed upon the statute in question by the authorities referred to and the standard by which we are requested to determine this question (in which, generally speaking, we concur), let us briefly refer to the evidence in this case which bears upon the facts, the life, the conduct, the declaration and the understanding of these parties for the purpose of determining whether or not it established that mutually acknowledged relation which the statute contemplates.

The testatrix in her will refers to these legatees as her nieces and makes no mention of any relationship. They were in the habit of calling her "auntie," and there is no evidence that they ever spoke to or of her as their mother. As we already stated, she often addressed them as "dear," "my dear girls," "dear girls," etc., and there is no evidence that she ever spoke to or of them as her daughters or children. There is nothing in the evidence to show that she ever held them out to the public as her children, or they her as a mother, and so far as the evidence discloses there is nothing to indicate that the reputation respecting the relationship which they bore to each other in the community was other than the legal one existing between them. The endearing terms in which the testatrix referred to these nieces is some evidence, standing alone, of the relationship contended for, but they are also consistent with the legal relations existing between them, and, taken in connection with all the other facts and circumstances in the case, are, we think, the more consistent with the latter relation. These declarations are not, however, controlling as to the relations existing between the parties, but are evidence of that relationship, to be considered in that connection with all the other evidence in the case. The acts, conduct and every-day life and dealings of the parties have, in our opinion, greater weight in determining the relations which in fact existed between them than mere declarations and speech. The latter is easily perverted or misconstrued, while the acts, conduct and dealing of the parties in every-day life point with almost unerring certainty to the true conditions and relation existing between them. We have reached the con-

clusion in this case that the testatrix did not stand in the mutually acknowledged relation of parent to these nieces and shall, therefore, only refer to the evidence in detail sufficiently to state our reasons for so holding.

Let us bear in mind during the further discussion of this case, that the testatrix possessed a very large fortune, the nature and extent of which, during the period in question, can readily be understood from the figures already given; that it must have yielded an income largely in excess of her needs; that she had no family of her own upon which to spend it, and that these girls were her nearest blood relations, living with her under the circumstances already detailed; and let us also bear in mind that the aggregate estate of these girls was about $50,000, or less than one-fifth of that of the testatrix, as the evidence shows. By bearing these facts in mind we can better understand the force of the evidence bearing upon the proposition under consideration.

The evidence of the nieces tends to show that the testatrix very frequently gave them spending money; that she always made her presents to them in that way, and that she kept no account of the moneys which she let them have, but they do not, as we now recall, give evidence of any knowledge that she furnished them with any spending money out of their own estates and charged the same against them in her accounts as guardian. With one or two exceptions, the evidence fails to show when or under what circumstances or in what amount she let them have money. Her accounts as guardian disclose the fact that she frequently and quite regularly let them have spending money from their own estate and charged the same against them, and her accounts bear evidence of the fact that these allowances were very liberal in amount. In view of these facts we are not convinced that the moneys that the testatrix let these girls have were all monetary donations on her part, but on the contrary we are of the opinion that the greater part of the same, at least, were moneys belonging to their estate which the testatrix was handling as their guardian. In view of these facts we cannot regard such acts of the testatrix as parental.

The act of the testatrix in placing Sarah in a boarding school for a period of two years, commencing when she was of the tender age of but nine years, is, to say the least, an unusual act and an uncommon thing for a parent to do, and but very few parents would consent to do so, or to be parted from their child in that manner when the child was of such tender age, unless extraordinary or

peculiar circumstances have been disclosed by the evidence in this case.

From the evidence of the nieces it would also appear that the testatrix received no compensation for her services in caring for and looking after them, at the same time conceding that they were supported, educated and maintained out of their own property. It does appear, however, that the testatrix was reimbursed for all expenditures incurred by her as guardian; and that their clothing was paid for from their estate; and that she received and took her commission as guardian, and also that she retained and received $7.50 per week for the board of each of them during the period of time they were living with her. Can it, therefore, be said that she received no compensation for these services? Her commissions fully compensated her for looking after their property, and considering the fact that they were residing in a rural community, $7.50 per week for the board of each of them was sufficient to reimburse her for the cost of their board and leave a reasonable compensation for her services in caring for them. The price charged was largely in excess of what their board was worth or would cost in the community where they resided. But let us look at these charges in another light. If the parental relation existed between these parties what right had the testatrix to make any charges for the board of these nieces? It is the duty of parents to support and educate their child, and, as we have seen, where this assumed relation exists the same obligations follow. We are unable to see how the testatrix, if she stood in the mutually acknowledged relation of parent to these nieces, would have any right to charge them for their board, or for their care. If they were her own children she would not be permitted to make these charges, and a court would not justify these expenditures. She had more property of her own than she could possibly use for her own benefit, and it seems incredible that she should charge these nieces for their care and board, and yet at the same time claim to stand in parental relation to them. These acts and this conduct on the part of the testatrix are not parental and tend to dispel the presumption that parental relations existed between her and them.

Again, the act of the testatrix in charging to Margaret the expenses of her wedding and wedding outfit tends to dispel the presumption and claim of a parental relation. What mother, situated as the testatrix was financially, would permit her child to pay for her wedding outfit and for the serving of her wedding

breakfast or supper? What mother so situated would permit her child to leave the parental roof under such circumstances? We cannot bring ourselves to believe that the testatrix would have done this if she had assumed this parental relationship towards these girls, or any mother real or assumed, similarly situated.

Then again, the presumption of parental relationship is dispelled by the acts of the testatrix in charging against these girls their school-books and tuition, sewing and mending, clothing and shoes, pew rent in church and many other items which are contained in her accounts as guardian. These acts are not only inconsistent with such relationship, but they are inconsistent with the legal obligations of a parent, or one who has assumed such relation, to support and educate their children.

It will serve no useful purpose to multiply illustrations of this kind which tend to characterize the nature of the relations existing between the testatrix and these residuary legatees. These acts of the testatrix are all consistent with her duties as guardian and are inconsistent with parental relations. These residuary legatees were evidently favorites of the testatrix, and she doubtless intended that they should have the proper care and bringing up. The acts and conduct of the testatrix suggest the existence of a well-regulated guardianship and nothing more.

Our conclusions are, therefore, that the testatrix did not stand in the mutually acknowledged relation of a parent to these residuary legatees for the statutory period of ten years prior to the transfer of the property in question.

A tax of five per cent. will be imposed upon all the property, real and personal, transferred to the residuary legatees by the will of the testatrix.

This brings us to the consideration of the second question involved in this proceeding. Were the deeds of gift of the real property, valued at $216, 550, executed and delivered by the testatrix to the residuary legatees eight days prior to her decease, made in contemplation of death, as that term is employed in subdivision 3, section 1 of the Taxable Transfer Act?

The evidence in this case establishes to our entire satisfaction that the transfer of property was made in contemplation of death. It is true that at the time the deeds were delivered nothing was said by the testatrix with respect to her decease or the probability of life, but the circumstances lead us irresistibly to the conclusion that she was contemplating this event at the time of making said

transfer, and that the same was made in view of that event. It appears that she was an old lady past seventy-nine years of age and afflicted with consumption, from which she knew she could never recover. For several months prior to making these transfers she had been under the constant and almost daily care of her physician, who had informed her that she could not be cured; that the only thing he could do for her was to make her feel better. Some days she coughed a great deal and was made very weak thereby, and upon other days would feel much better. She was constitutionally weak, yet possessed of great vitality. She knew the fact that she was liable to be taken worse and die at any time, or, upon the contrary, that she might live for a considerable period of time. It was under these conditions that she contemplated making a transfer of property to her nieces. Her attorneys were instructed to make investigation and prepare and make necessary papers to that end. The property transferred constituted the large bulk of her property, considerably more than two-thirds of the amount thereof in value. Taking all these facts and circumstances into consideration, it seems to us that no other conclusion can be reached than that the testatrix, in making this transfer of property, was considering, thinking of, and contemplating the fact that she was approaching the end of her lease of life, and that her act in making such transfer was in contemplation of that event. It is urged by counsel for the residuary legatees that our conclusion in this respect is not warranted by the facts and circumstances disclosed, and this transfer was not made in contemplation of death. It is claimed that if the testatrix had contemplated it, it would have been unnecessary to make and she would not have made the transfer, because of the fact that these residuary legatees to whom the transfer was made would have taken the same property under and by virtue of the terms of her will; and it is urged that the reason why the transfer was made was because she was desirous of having these nieces enjoy the income from a portion of her estate during her lifetime. It appears that the testatrix had frequent conversations with Margaret, for the period of about five years prior to her death, in regard to the contemplated conveyance of a gift of certain of her real property to them. From their testimony it would appear that she had very frequently told them that it was her intention and desire to convey to them a portion of the real property so that they might have and enjoy the income thereof during her lifetime. Kate Sperry, the servant of the testatrix, testifies to conversations had

with the testatrix in April and September before her death, in which she stated it was her intention to convey to these certain nieces certain of her real property to the end that they might have and enjoy the income therefrom during her life, and the testatrix told her in these conversations that she wanted these nieces to have this property right away. In view of these facts it is urged by counsel for the comptroller that if the testatrix was so anxious that these nieces should have the use and income of this property during her life, and that she wanted them to have it right away, and had frequently talked with them and her servant concerning it for the period of time disclosed by the evidence, she would have deeded the property to them at the time she required the attendance of her counsel for the purpose of preparing her will in June, before her decease, instead of giving it to them by that instrument. It is also urged that if the testatrix desired these nieces to have a portion of her income, that she would have given some portion thereof during her lifetime, but that, instead of so doing, she retained the same unto herself and even collected the rent for the month of December, in which she made the transfer of the property in question on the 5th instant.

The fact that the testatrix deeded to her nieces the same property which was devised to them by her will, executed but a few months previous, standing alone and by itself would be a strong indication that she did not contemplate death at the time of making the transfer, and was actuated in so doing by the thought of her approaching end, but when taken in connection with the other circumstances in the case, which we have already referred to, it seems to us that the force of that presumption is completely destroyed. It seems quite clear that she may have had other reasons for desiring to deed this property to her nieces rather than have it pass by her will. She was acting under the advice of counsel, and it is quite possible that she may have contemplated the possibilities of a contest over the will after her decease and desired to obviate it by a gift of the property in her lifetime, or it is possible that the question of transfer tax may have induced her action in that respect. But it is unnecessary to discuss these questions, as her motives for the act whether to avoid the tax, or to avoid litigation over her will, could make no difference as to the liability of this property to taxation.

The deeds of conveyance were without consideration and constituted a gift of the property to these nieces. Possession was de-

livered and they immediately assumed the control and management of the property. The gift was one *in presenti*. It was a gift *inter vivos*, absolute, unreserved and unconditional. It was not a gift *causa mortis*, because it was not intended to be conditional, and no right of revocation was reserved either expressly, by inference or by implication. It passed to these nieces an absolute, irrevocable and indefensible title.

The act (Laws 1892, chap. 399, § 1) provides that a tax shall be paid:

"1. When the transfer is by will or by the intestate laws of this state from any person dying seized or possessed of the property while a resident of the state.

"2. When the transfer is made by will or intestate law of property within the state, and the decedent was a nonresident of the state at the time of his death.

"3. When the transfer is of property made by a resident or by a nonresident, when such nonresident's property is within this state, by deed, grant, bargain, sale or gift made in contemplation of death of the grantor, vendor or donor, or intended to take effect, in possession or enjoyment, at or after such death. Such tax shall also be imposed when any such person or corporation becomes beneficially entitled, in possession or expectancy, to any property or the income thereof, by any such transfer, whether made before or after the passage of this act."

It is very evident that the word "deed" as used in this act has no reference to conveyance of property by such an instrument made in the ordinary course of business for a valuable consideration, but is confined to conveyances of real property intended as gifts, and it is also quite evident that it was intended to eliminate any technical distinction between gifts of real property and personal property, and place both classes in the same category, so far as the taxation of the transfers thereof under this act are concerned. We shall, therefore, in determining the question involved, treat the conveyance of this property, by deed, as a gift *inter vivos* made in contemplation of death.

It is urged that this statute does not impose a tax upon the transfer of property by gifts *inter vivos*, but is confined in its operation, in imposing a tax upon transfers by gift, to gifts *causa mortis*. The language of subdivision 3, section 1 of the act in question reads: "When the transfer is of property * * * by deed * * * or gift made in contemplation of the death of the

grantor, vendor or donor, or intended to take effect, in possession or enjoyment, at or after such death."

Thus far the language of the statute is plain and unambiguous. It is not in express terms limited in its operation or effect to any particular class of gifts, but is broad and unrestricted enough to cover alike grants or gifts *inter vivos* made in contemplation of death as well as gifts *causa mortis*. In both cases, however, the statute, as a condition of the right to tax, requires the concurring event, that such gift should be made in contemplation of death.

The rule is well settled in the interpretation of statutes that the legislature is presumed to use apt words to express the meaning and intent of its enactments, and it is ordinarily the duty of the court in construing a statute to give the language employed its usual and ordinary meaning and force. Matter of Nichols, 91 Hun, 138; Tompkins v. Hunter, 149 N. Y. 117-122.

We see nothing in the language employed in this act, thus far, which requires or justifies a court in limiting its operation to one particular class of gifts to the exclusion of the other.

There is another salutary rule adopted by our courts and universally recognized in the interpretation of statutes, which is quoted by Peckham, J., in the case of People ex rel. Savings Bank v. Butler, 147 N. Y. 167, viz.: "The cardinal rule in the interpretation of statutes is to arrive and give effect to the intention of the legislative body which enacted them." In the same case Peckham, J., in discussing and applying the rule says: "This intention is primarily to be deduced from the language used in the statute itself, and it has been said that where said language is clear and unambiguous there is no room for construction and that effect must be given to its plain and obvious meaning. Language which, when separated from the rest of the act, is thus plain and unambiguous may, when read in connection with the whole act, be thereby rendered ambiguous and the necessity for construction become for that reason quite apparent. Sometimes the language of some parts of a statute, when considered with reference to the ordinary meaning attributed to such language, is so clear and unambiguous that it would seem not to be open to any construction other than its plain, obvious meaning calls for, and yet, when read in connection with the whole act and in the light of what the real intention of the legislature must in the nature of things have been, the construction properly to be favored leads to a result which is different from what it otherwise would have been."

Before referring to other provisions of the statute under consideration which may be relied upon to give it a different interpretation than its plain language seems to indicate, under the rule advanced by Peckham, J., in the Butler case, let us call attention to another salutary and well-settled rule, that a law is never to be construed as having a retroactive effect unless its express letter or clearly manifested intention so requires; that, if the language of the law can be satisfied by giving it prospective operation, it should be construed as having a prospective operation only.

In the light of these rules let us refer to the language of the act immediately following that last quoted, upon which reliance must be placed to give it a different meaning than its plain language seems to indicate; a meaning which will limit it to gifts *causa mortis* and exclude from its operation gifts *inter vivos* made in contemplation of death. Such language is as follows: "Such tax shall also be imposed when any such person or corporation becomes beneficially entitled, in possession or expectancy, to any property or the income thereof, by any such transfer, whether made before or after the passage of this act." The question now recurs, does this language restrict the operation of the statute to a particular kind or class of gifts, namely, gifts *causa mortis?* If such is its effect it is by reason of the fact that to give it a construction which will embrace all classes will make it retroactive in its operation and effect.

That it applies to gifts *causa mortis* there can be no question. Matter of Seaman, 147 N. Y. 69; Matter of Green, 7 App. Div. 339; Matter of Crosby, 46 N. Y. St. Repr. 442. In fact, under the statute of 1887 (chap. 713), and before the amendment thereto embracing transfers by deed, gift, etc., made in contemplation of death, incorporated in 1892, the language of the statute which provided that deeds, gifts, etc., intended to take effect at or after death, was probably broad enough to cover this class of gifts, for a gift *causa mortis* is made with respect to its effect after death, is conditional upon the happening of that event and revocable during life, and may, therefore, be said to take effect at or after death. This interpretation was placed upon that language by the court in the case of Matter of Edwards, 85 Hun, 436.

If this interpretation of the statute as it then existed is correct, then the amendment of 1892, by adding the words "made in contemplation of death," etc., have no new office to perform and are practically valueless, if limited in their application to gifts *causa*

mortis. We do not believe that such was the intention of the legislature in incorporating this amendment into the statute.

Now, let us again refer to the part of the statute which we have quoted for the purpose of determining whether it can be applied to grants and gifts *inter vivos* made in contemplation of death, as well as grants and gifts *causa mortis*, without giving it a retroactive effect, because if it can be, the plain and unambiguous language of the statute must govern and be given its usual and ordinary meaning and should not be restricted to the latter class of gifts only.

The act speaks from the time it takes effect and seems to us very clear and plain that the vesting of the beneficial interest in possession or expectancy, which is the condition precedent to the right to tax, is a future event; an event occurring after the passage of the act, and cannot be held to apply to a beneficial interest already vested in possession or expectancy. This doctrine is clearly recognized in the Seaman case, 147 N. Y. 69.

Then again the verbs "shall" and "become" and the adverb "when," as they are employed in the act, clearly refer to future and not to past events. The act then provides that the tax shall then be imposed, at the time indicated, upon the transfer of property, "whether made before or after the passage of this act." We understand this to mean that the instrument or act creating the transfer or right of succession may, in a possible case, have been executed before the passage of the act, in contemplation of death or intended to take effect at or after death, and where the event happens after its passage, which vests for the first time a beneficial interest in possession or expectancy, it is subject to the rights of succession or taxation, but if both the transfer or right of succession and the vesting of the beneficial interest, in possession or expectancy, occurred before the passage of the act, the same could not be subjected to taxation thereunder, by reason of the fact that, as we have already seen, the vesting of the beneficial interest is an event which must occur after its passage, otherwise it is not taxable. In the view which we take of this case it is unnecessary to discuss or determine the application of this language to the case of wills, or other instruments affecting the transfer of property, executed before the passage of the act, in respect to whether the statute would be considered retroactive as to them. For the purposes of this case we may treat the language as applying only to those cases immediately preceding it in the same subdivision, namely, grants

or gifts made in contemplation of death or intended to take effect at or after death.

In the case under consideration the transfer by gift was made after the passage of the act.

It seems clear that this statute can have no retroactive effect when applied to grants or gifts *inter vivos* made in contemplation of death. A gift *inter vivos* is a gift *in presenti*, a consummated and completed act and has no reference to past or future acts or events. It would be an impossibility to have a gift *inter vivos* created by an instrument or act made prior to the passage of this act take effect upon the happening of an event which should occur after its passage. It would lack the essential elements necessary to constitute such a gift, namely, immediate delivery and the passing of an irrevocable title. This statute can have a prospective operation when applied to this class of gifts, but, as we have seen, it can have no retroactive effect with respect to them.

In the construction of statutes, it ofttimes is of material aid in determining the true legislative intent of a statute or an amendment to look to the cause or necessity therefor and the defect or mischief which it is sought to remedy. The statute, as it existed prior to the enactment of chapter 399 of the Laws of 1892, subjected to taxation transfers by deed, gifts, etc., intended to take effect at or after the death of the grantor or donor, but it did not impose a tax upon grants or gifts made in contemplation of death. It, therefore, might have been possible, if not a practice, for persons who knew or believed that they were about to die, to give away their property, thereby avoiding the transfer tax, and it is very obvious that, by incorporating this amendment into the statute referred to, which brought grants, gifts, etc., " made in contemplation of the death of the grantor, vendor or donor " under the operation of the statute, the legislature intended to remedy this defect.

Now, if we are to say that this language applies only to gifts *causa mortis* and was not intended to cover gifts *inter vivos* made in contemplation of death, then all that will be necessary for a person, who contemplates that he is about to die, to do, in order to defeat the provisions of the statute, is to make an absolute and irrevocable gift, a gift *inter vivos*. If we hold this to be the meaning of this language it seems to us that it will defeat the very purpose of the amendment. As we have already stated, gifts *causa mortis* were probably covered by the statute before the amendment, and to hold that the amendment is not to apply to gifts *inter vivos* made in

contemplation of death will be to render the language thereof nugatory.

We do not believe that such was the intention of the legislature or that such is the correct interpretation of the statute. And we, therefore, hold that the transfer of the real property in question by the deeds of gift from the testatrix to these nieces, her residuary legatees, is taxable.

We have examined with considerable care the Matter of Seaman, 147 N. Y. 69, and the Matter of Green, 7 App. Div. 339. (The latter case was reversed upon other points than those under consideration in 153 N. Y. 223.) Both of these cases discuss the meaning of the language employed in the amendment to which we have referred.

In the Seaman case the court says that the language employed evidently refers to gifts *causa mortis*, but does not, directly or by necessary inference, hold that gifts *inter vivos*, made in contemplation of death, are excluded from its operation and effect. The fact in that case was essentially different than in this case. The question in that case arose under a will which was made and went into effect long before any taxable transfer law was enacted.

We think that either of the cases cited are controlling in this case. The question under consideration here was not involved in either of them. Neither are we aware that this precise question has ever been passed upon by any courts. We have, therefore, treated it as an original proposition, and have given to the statute an interpretation which seems to us to be in accord with the legislative intent in enacting it, and which, as it seems to us, gives to the language employed its ordinary signification.

Decreed accordingly.

In the Matter of the Probate of the Last Will and Testament of William Lampson, Deceased.

(Surrogate's Court, Genesee County, December, 1897.)

1. Will — Bequests for charitable purposes made within two months of testator's death.

The provisions of section 6 of chapter 319 of the Laws of 1848, invalidating devises and bequests to institutions or corporations formed under the act, unless the will in which they were contained was made

and executed at least two months before the death of the testator, have no application to a will executed, within the prohibited period, by which a testator gives his residuary estate, consisting of real and personal property of the value of $500,000, to Yale University, a foreign corporation, authorized by chapter 128 of the Laws of 1881, to take real property by gift or devise within this state.

2. **Statutory construction — Repeal of a whole act except one section — Scope of repealing act, Laws of 1895, chapter 559.**

The fact that all the other sections of chapter 319 of the Laws of 1848 were repealed by the Membership Corporations Law (Laws of 1895, chap. 559) does not give section 6, excepted from the repeal, any new force nor make it a part of the Membership Corporations Law; as the apparent purpose of the exception was merely to indicate an intention that institutions already organized under chapter 319 of the Laws of 1848 should continue to be subject to the restriction, contained in section 6, as to bequests made within two months of the death of the testator.

3. **Same — Portions excepted from repeal are not engrafted on repealing act.**

Where portions of a law are excepted from repeal by the schedule annexed to the various laws prepared by the Statutory Revision Commission, the portion so excepted does not become engrafted upon the law to which the repealing schedule is attached.

4. **Same.**

For the purpose of determining what force should be given to a portion of a statute excepted from repeal, resort may be had to the act itself as it stood at the time of the repeal.

5. **Will — Right of a foreign corporation to take a bequest, made within two months of the death of the testator, as affected by the General Corporation Law and the Membership Corporations Law.**

Neither the provisions of the General Corporation Law (Laws of 1890, chap. 563) nor those of the Membership Corporations Law have in any manner extended the restriction contained in section 6 of chapter 319, Laws of 1848, so as to make it applicable to foreign corporations which have no similar restrictions in their charters; nor is there any general legislative policy hostile to bequests made to foreign corporations within two months of the death of the testator.

6. **Same — Public policy.**

The fact that, since the enactment of the Membership Corporations Law, the legislature has granted charters to several charitable in-

stitutions without imposing the two months' limitation, and has, in other instances, removed similar restrictions, affords strong evidence that there is no general public policy against such bequests.

7. Same — Classification of corporations — Jurisdiction of Surrogate's Court over bequests.

The classification of corporations, and the jurisdiction of the Surrogate's Court to determine the validity of bequests, discussed.

PROCEEDINGS on probate of will.

William R. Crofoot (William C. Watson and Walter H. Smith, of counsel), for executor.

Wilson S. Bissell and Martin Carey, for Yale University.

Myron H. Peck, Jr. and Frederick S. Randall, for Laura Ann Brooks, contestant.

Arthur E. Clark, Eugene L. Bushe, Edwin McKnight, P. B. Hulett and David J. Bissell, for heirs-at-law.

NORTH, S. William Lampson, the testator, died February 14, 1897. On the 21st day of December, 1896, less than two months before his death, he executed the will which is the subject of the present controversy. Decedent was a bachelor about fifty-six years old. His nearest relative is an aged aunt residing at St. Paul, Minnesota, and who would be entitled in case of intestacy, or in the event that any bequests should be held invalid, to the entire unwilled personal estate. His heirs-at-law consist of this aunt and more than fifty descendants of deceased uncles and aunts, both on the side of the father and of the mother of testator. The personal property is of the value of about $400,000, and the real estate is worth from $75,000 to $125,000. The entire estate, excepting about $35,000, is given to Yale University, the disposing clause beginning: "I give and bequeath unto my alma mater, the corporation of Yale College."

On the day of the return of the citation for probate, appearances were entered in behalf of a large number of the heirs and answers were filed containing objections in the form usual in cases of contested probate, alleging undue influence and lack of testa-

mentary capacity. The answers also put in issue the legality of the bequests to Yale University, and the decision of this court was invoked, under the provisions of section 2624 of the Code of Civil Procedure, as to the legality of these bequests. Upon the hearing, the contest was abandoned so far as the questions of capacity and undue influence were concerned, and the contestants are now in court solely with respect to the validity of the bequests last referred to.

Upon this question only Mrs. Brooks, the aunt, is directly interested, for the reason that the statute gives to the Surrogate's Court no jurisdiction to determine the validity of any devise of real estate. The result of this, as all parties concede, is that the will must be admitted to probate and letters testamentary issued to the executors in the manner provided for by the will. In case the courts shall decide the bequests to Yale valid, such decision will, although indirectly, effectually dispose of the validity of the devise, since the same principle would apply in the disposition of the real estate as in the case of personal property. Should the provisions for the university be held upon appeal from this decision to be invalid, the heirs-at-law will have their appropriate remedy to gain possession of the real estate, and such remedy will be unaffected by the fact that the will has been admitted to probate. Chapter 128 of the Laws of 1881 authorizes Yale College to take real property by gift or devise within this state.

The sole ground upon which the bequests to Yale are assailed is that the will was executed less than two months before the death of testator, in contravention as is claimed, so far as the bequests are concerned, of a statute of this state. The large amount of property involved, the somewhat unusual attention which this case has attracted, the great care and labor bestowed by counsel in the preparation of exhaustive briefs and in the very able oral arguments, have rendered it the duty of the court to give to the case the most careful examination and study. These considerations, as well as the fact that counsel have united in the request, have led me to state quite fully the reasons for my decision.

Certain statutes of this state and one decision of the Court of Appeals must at the outset be freely quoted, as upon these statutes and this decision counsel on both sides largely rely. They are without doubt decisive of the controversy. Chapter 319, of the Laws of 1848, is entitled "An act for the incorporation of benevolent, charitable, scientific and missionary societies." Section 1

of this law prescribes the method by which corporations may be formed, and enumerates the purposes for which societies may be incorporated under the act. Section 6, the provision which has given rise to most discussion, has never been amended. Reference will necessarily be made to this section so many times that I shall continue to refer to it merely as section 6, without further statement as to the chapter or the year of its enactment. It is here given in full:

"Section 6. Any corporation formed under this act shall be capable of taking, holding or receiving any property, real or personal, by virtue of any devise or bequest contained in any last will or testament of any person whatsoever, the clear annual income of which devise or bequest shall not exceed the sum of ten thousand dollars; provided, no person leaving a wife or child or parent shall devise or bequeath to such institution or corporation more than one-fourth of his or her estate after the payment of his or her debts, and such devise or bequest shall be valid to the extent of such one-fourth, and no such devise or bequest shall be valid in any will which shall not have been made and executed at least two months before the death of the testator."

On the 27th day of April, 1892, the University Law was passed. This law, like the numerous other enactments which have been prepared by the statutory revision commission of this state, gathered together, with many additions and modifications, the laws which had been passed from time to time on this subject and which were scattered through the statute books. In this way one comprehensive and harmonious statute took the place of a large number of imperfect laws and amendments, often difficult to find and in some measure conflicting. By the provisions of this law, sixty-six acts of the legislature, passed in almost as many different years, beside considerable portions of the Revised Statutes, were repealed, the repealed portions having been, so far as was desired, re-enacted in the new law. The statute defines the term "University" as meaning the University of the State of New York, and section 24 of the act provides: "The institutions of the University shall include all institutions of higher education which are now or may hereafter be incorporated in this state."

On the 18th of May, 1892, the General Corporation Law was enacted. As its name indicates, this law is general in character, classifying the different kinds of corporations, providing for the methods of formation, the limitation of powers, the acquisition of

property, besides various other matters such as would naturally be included in a law of this description. Section 11 is in part as follows: "Grant of general powers.— Every corporation as such has power, though not specified in the law under which it is incorporated: 3. To acquire by grant, gift, purchase, devise or bequest * * * subject to such limitations as may be prescribed by law."

Among the kinds of corporations provided for by the General Corporation Law of 1892 are membership corporations, and in 1895 the legislature, following out the scheme of the revision commission, passed the Membership Corporations Law. At the end of this act, as in the case of the other laws prepared by the commission, there is appended a schedule of laws repealed. This schedule includes 114 acts of the legislature repealed in full and eighteen repealed in part. In the latter class is found the act hereinbefore referred to for the incorporation of benevolent, charitable, scientific and missionary societies, which is set down in its chronological order in the schedule as follows: "1848 — Chapter 319. All except section 6."

The decision to which reference has been made, and which is by common consent the leading authority bearing upon the present controversy, is Hollis v. Drew Theological Seminary, 95 N. Y. 166. This case was decided in 1884. The will of testator gave a bequest to Drew Theological Seminary, a corporation formed under the laws of New Jersey, and another bequest to The Wesleyan University, a Connecticut corporation. It was contended in behalf of certain relatives of the testator that these bequests were void under the provisions of section 6 referred to, by reason of the fact that the will was made less than two months before death. It would appear from this that the questions presented were identical with those raised in the present case, and unless satisfactory and conclusive reasons to the contrary are shown, that the decision of the court of last resort must control at this time. The counsel for Yale University rely so confidently upon this decision as sustaining their position, and counsel for contestants, realizing the force of this claim, has attempted so ingenious a distinction between this case and the one at bar, that I have thought best at this time to quote largely from the opinion of the distinguished jurist who rendered the judgment of the court. The contention in behalf of contestants is based upon that very brief portion of the opinion which for convenience and greater perspicuity I have italicised.

Referring to section 6, the opinion states: "The whole of that section clearly has exclusive reference to corporations formed under that act, and the prohibition contained in the latter clause of the section is simply aimed at devises and bequests made to such corporation. As there was not a similar prohibition in the charter of either of these corporations, these bequests cannot be condemned by the letter of any statute. So much is clear."

The opinion then proceeds: "The general rule is that one may do with his property as he pleases. He may dispose of it by will in any way that suits his fancy or his judgment. He may give it all to strangers and thus disinherit his relatives. He may give it all to natural persons or to corporations capable of taking. He may give it directly or create trusts which the law allows; and this general power of disposition he possesses down to the last hour of conscious, intelligent existence.

"It is not against public policy to allow gifts to charitable, benevolent, scientific or educational institutions. The law allows and encourages such gifts, and those who make them are commended as the benefactors of their race. Such institutions, dotted all over our land, to succor, elevate, educate men and ameliorate their condition, are distinguishing features of our modern civilization.

"It is just as praiseworthy to give to these institutions by will, within two months before a testator's death, as at an earlier date. There is nothing essentially evil or of evil tendency in gifts thus made. They do not disturb the public weal. But it so happened that testators in the imminence of death, unduly influenced by hopes or fears or by importunities of interested parties, sometimes gave improvidently to such institutions, disregarding the claims of near relatives, forgetting the maxim that 'charity begins at home,' and hence when the legislature came to frame a general law for the incorporation of these institutions by any persons who chose to associate for that purpose, it devised the limitations found in the act of 1848. The limitations, as above stated, applied only to corporations formed under that act, and those were corporations for 'benevolent, charitable, scientific and missionary purposes.'

* * * * * * * *

"In one of the opinions delivered in the case of Kerr v. Dougherty, it was said that between that year and the year 1870 nearly one hundred and fifty acts were passed creating new corporations, or extending and enlarging the powers of old corporations,

similar to those named in the act of 1848, and that the two months' limitation was imposed upon but few of such corporations; and since 1870 similar action has been taken many times by the legislature. How can it be said then that there is any general public policy as to the two months' limitation? When the legislature has desired its imposition it has imposed it, and thus far indicated its policy. * * * If such was to be the general policy of the state, why was not the two months' limitation also made applicable in terms to all such corporations? * * * That cannot be enforced as public policy by the courts which the legislature one day prohibits, in some cases, and another day permits in other cases. *If there were a general law in this state that no bequest to any of such corporations should be valid, unless contained in a will made at least two months before the death of the testator, that would indicate a general public policy which the courts of this state would enforce against foreign corporations which might come into this state, although such a limitation was not imposed by the laws creating them.* * * * There is no policy outside of the statute which condemns such wills. The policy is found only in the statute. * * * If these appellants had been domestic corporations the two months' limitation would not have applied to them, and so it cannot be applied to them as foreign corporations. They must stand here in this case upon the same footing as if they had been created here. It would be a bold claim for any one to make, that the courts in the enforcement of a supposed public policy would apply this limitation to the numerous domestic corporations to which the statute law has not applied it, and no more can it be applied to foreign corporations without the sanction of law. * * *

"I conclude, therefore, that the two months' limitation, contained in the act of 1848, applies exclusively in terms to corporations formed under that act, and that there is no public policy established, either by statute law or judicial decisions or general consent, which authorizes us to enforce that limitation against domestic corporations which are not expressly subjected to it by statute, and hence that it cannot be enforced against foreign corporations which are authorized by their charters to take property by devise or bequest free from a similar limitation in the state of their creation."

These statutory provisions and the decision quoted form the foundation of contestant's claim. It has seemed to me that any

examination of the questions involved in this case, however thoroughly entered into, made from ordinary standpoints, must result in the conviction that the claim made in behalf of the next of kin of testator finds complete refutation in the statutes and decision relied upon in its own support. Arguing from premises not commonly to be conceived of, to say the least, the ingenuity of the learned counsel for the contestant has wrought out a theory by which it is maintained and upon which an able and elaborate argument is based, that the expression of opinion by Judge Earl in the Hollis case, in the sentence which I have italicised, when applied to the statutes which have been quoted, affords sufficient ground for adjudging the bequests to Yale University invalid and illegal, because made two months before the decease of testator.

The claims advanced by counsel, although not categorically stated by him in his brief, seem to me to be fairly stated as follows:

1. The repealing schedule of the Membership Corporations Law having preserved section 6 of the act of 1848, while repealing the rest of the law, this section is to be deemed as engrafted upon and made a part of the law which thus saved it from repeal, the language employed by counsel being, "Section 6 remaining unrepealed by this act is apparently left as a part of the Membership Corporations Law."

2. The General Corporation Law of 1892, by providing that corporations formed under it might take by devise or bequest "subject to such limitations as may be provided by law" must now be construed as including section 6 of chapter 319 of the Laws of 1848 as among "the limitations which may be provided by law."

3. The Court of Appeals in the case of Hollis v. Drew Theological Seminary, 95 N. Y. 166, having decided (*a*) that the restrictions contained in section 6 only applied to corporations organized under that law, (*b*) that the said section had no application to corporations formed in other states, (*c*) that bequests to foreign corporations for humanitarian purposes were not against public policy and that there was no public or legislative policy against bequests made within two months of death, the legislative policy of the state underwent a radical change in the year 1895, such change being evinced by the retention of section 6 at the same time the remaining sections of the same act were repealed, thereby rendering that section "a part of the Membership Corporations Law."

4. All colleges and universities, being nonstock corporations, are, therefore, under the classification laid down in the General

Corporation Law, membership corporations, and are to be classed among the corporations provided for by the Membership Corporations Law of 1895. The language employed by counsel in his brief is "the legatee and devisee in this case is a nonstock corporation and comes under the general head of membership corporations."

5. Yale University is, therefore, such an institution as, if organized under the laws of the state of New York, would be a membership corporation.

6. The other sections of the act of 1848 having been repealed, and section 6 having been saved by the act of 1895 and engrafted thereon, said section must be construed by the courts as freed from the limitations of the sections which formerly environed it, and as having become a law of general application to all corporations of the kind provided for by the Membership Corporations Law.

7. A general public policy having been evinced or ordained by the transfer of section 6 from the act of 1848 to the act of 1895, the expression employed by Judge Earl in the Hollis case may now be resorted to, and Yale University being such a corporation as under the laws of New York "comes under the general head of a membership corporation," must now yield to the new and changed public policy of this state, and may no longer take by devise or bequest contained in a will executed less than two months before death.

Stated now more concisely, and condensed into a single proposition, the contestant, having assumed for the dictum in Hollis v. Drew all the weight and authority of a deliberate decision, seeks to maintain that the legislature has now enacted "a general law that no bequests to any of such corporations should be valid unless contained in a will made at least two months before the death of the testator."

The proposition that section 6 has become "a part of the Membership Corporations Law" and has acquired added force by the manner of its retention and by virtue of the repeal of the remainder of the act of 1848, is vital to the contention made by the contestant, for it is only upon this theory that the force of the decision in Hollis v. Drew can be met or overcome. I am wholly unable to discover any reason or authority for the claim that this section is to be given any different force or effect under or by reason of the circumstances of its repeal than it would have been entitled to had a separate and distinct law been enacted for the sole purpose of repealing chapter 319 of the Laws of 1848, excepting section 6.

The doctrine is new and surprising that where an act of the legislature is all repealed except one section, such section becomes by virtue of the exception a constituent part of the repealing law, or obtains any new or different force or effect by reason of the obliteration of the sections which had formed part of the original act. The learned counsel for the contestant, in a brief evincing the greatest labor and research, wholly fails to cite a decision or authority promulgating or suggesting any such doctrine or containing an intimation that such has ever been recognized as the law.

On the other hand, how obvious is the purpose for the retention of section 6. A large number of societies had been organized under this act during the course of forty-seven years. All were subject to the provisions against the validity of bequests made within two months of death. No good reason seemed to exist why these societies should be relieved from the restriction, which by the very terms of their organization had been assented to. Section 6 begins with the words: "Any corporation formed under this act." The "act" having been repealed and the section left, as counsel for proponents describes it, "floating and unattached," it might be said to have no meaning and its retention to serve no purpose, except for the fact that the opening words of the section put the investigator to the inquiry as to what act is referred to, and his research is at once rewarded by the discovery that it is an act for the formation of benevolent, charitable, scientific and missionary societies. It would be further discovered that the section which had been saved from repeal, by its express words, referred to corporations which could no longer be formed because of the repeal, and the one natural and logical reason which would be assigned for its retention, the one possible office to be fulfilled by it, would be to continue in force the restrictions which it contained as applied to corporations already formed under the act. The repeal of the law did not repeal the societies to which it had given birth; it simply prevented the organization of any more corporations under the law, and the preservation of the restrictive section simply held the societies already organized to the basis upon which they were originally formed.

There is the highest authority for the doctrine that for the purpose of determining what force shall be given to portions of a statute excepted from repeal, resort should be had to the act itself as it stood at the time of the repeal, and the doctrine is of the ut-

most value in the decision of this case, and in meeting, as it seems to me it does, the arguments made in behalf of contestant.

In Endlich on the Interpretation of Statutes, it is said at section 49, "Where a part of an act has been repealed it must, although of no operative force, still be taken into consideration in construing the act." In Bank for Savings v. Collector, 3 Wall. (U. S.) 495-513, it is said, "Although the proviso is repealed, still it is proper to resort to it * * * as affording a legislative exposition of what is meant by the phrase 'engaged in the business of banking' as employed in the first clause of the section under consideration." In *Ex parte* Crow Dog, 109 U. S. 556-561, decided by the Supreme Court of the United States in 1883, the opinion states, "Nevertheless, although the section of the act of 1834 containing the definition of that date has been repealed, it is not to be regarded as if it had never been adopted, but may be referred to in connection with the provisions of its original context which remain in force, and may be considered in connection with the changes which have taken place in our situation, with a view of determining from time to time what must be regarded as Indian country where it is spoken of in the statutes. It is an admitted rule in the interpretation of statutes that clauses which have been repealed may still be considered in construing the provisions that remain in force."

Another claim made by counsel for contestant is that institutions of the character of Yale are membership corporations as defined by existing statute. This theory is quite necessary to his contention, in view of the claim made for section 6 as a constituent part of the Membership Law and of the analogy sought to be made between Yale and educational institutions of this State, although, on the other hand, to concede the claim could scarcely prejudice the position of proponents. The argument made is a strong one and at first thought does not seem readily assailable. The claim is based on the classification made by section 2 of the General Corporation Law. This law provides that corporations shall be of four general kinds, municipal, stock, nonstock, and mixed. Each of these is again subdivided, the statute providing that a nonstock corporation shall be either a religious corporation or a membership corporation. Following this provision literally a college or university would appear to be a membership corporation. But the revision commission digressed widely from this classification in the later bills submitted to and enacted by the legislature. To illus-

trate, the statute referred to provides that mixed corporations shall be either cemetery, library, co-operative, board of trade, agricultural or horticultural corporations. This classification has since been wholly ignored by the legislature and it is doubtful if there is now such a thing as a mixed corporation, as all the classes above enumerated are apparently provided for in other ways. Counsel for contestant in his brief filed in reply says, "the mixed corporation has been lost in the shuffle."

As I have already shown, even before the enactment of the General Corporation Law, the University Law had been passed, providing a comprehensive scheme for the formation and government of colleges and universities, and directing in explicit terms how all such institutions should be incorporated, by methods wholly outside the General or Membership Corporations Laws. The University Law was the work of the revision commission, and it seems apparent that having by the act of April 27, 1892, provided a complete system for the incorporation of colleges and universities, it was not intended by the later act of 1895 to include such institutions of learning along with societies so wholly different in character as those provided for by the Membership Corporations Law. The general plan laid out by the revisers when they began their work has evidently been modified, but as has been well suggested by counsel for the university, they have not always remembered, when a change was made and a new plan substituted, to go back and pick up all the threads, follow out the subject in its various ramifications and make the change complete, but have been content to make the change in the general plan, leaving the little inconsistencies to be explained by the text itself.

Neither do I believe, in the light of the comprehensive and complete system of laws which has existed in this state from an early date providing for the incorporation of institutions of learning, a system which has now culminated in the University Law of 1892, that the limitations contained in the act of 1848 could be extended by analogy to Yale, even were Yale a domestic corporation. When the will in question was made, in December, 1896, the act of 1848 had been repealed except as to section 6, and the only method for incorporating a college or university in this state under a general law would have been by virtue of the University Act. So far as I can find from an examination of the act of incorporation of every college or university of note within this state, aided as I have been by the instructive brief of counsel for Yale, not one

has been formed under the act of 1848, and it may well be doubted whether with the complete and harmonious system of law in this state for the formation of educational institutions and the stringent power of supervision which the law places in the hands of the regents of the university, the legislature ever intended that there should be in existence at the same time another law under which similar institutions might be formed free from these restrictions, and at liberty to confer degrees and award diplomas upon such terms and subject to such regulations only as the institutions might see fit to impose. I have not overlooked chapter 367 of the Laws of 1882, which was probably passed rather to prevent apprehended evil than as a distinct recognition of the class of institutions therein referred to. This entire question is argued out most exhaustively by the learned counsel for Yale in their able and scholarly brief. It is full of force, and yet, with the view I have taken of this case, its importance must be subordinated to considerations which place the decision on what seems to me the strongest and safest ground possible. It is sufficient to say that Yale University is not a domestic corporation; it was not incorporated under the act of 1848; there is no public or legislative policy against bequests made within two months of death; Yale is not within the scope of the statute prohibiting such bequests; section 6 has no greater force than before the repeal of the other sections of the same law; the phrase used in the General Corporation Act, "subject to such limitations as may be prescribed by law," has no application to this case. It would only add another column to the structure if it were to be said, as counsel for the university claim, that purely educational institutions were never intended to be incorporated, and in no single instance have been incorporated, under the act of 1848. However strong the argument of counsel and however correct their conclusions, I do not deem it best to base my decision on this ground.

The language of section 11 of the General Corporation Law which I have quoted does not mean that every "limitation which may be provided by law" shall apply to every corporation. Such a construction would lead to endless confusion and would render the recent important legislation of the state a mass of inconsistency. It is entirely clear that the words just quoted from the statute imply that each class of corporations shall be subject to such limitations as pertain to that class, and to such limitations only. If the legislature of the state of New York, or the learned and

experienced commissioners of statutory revision, desired or intended to effect so radical, important and far-reaching a change in the law as that claimed by counsel for contestants, the result would have been accomplished not by the complex, uncertain and sinuous methods which it is claimed have brought about the result, but by a direct, clear and unequivocal enactment that corporations or certain designated corporations might no longer take property by a will executed within two months of death, and that foreign corporations should be subject to the same rule. The steadily progressive character of legislation in this state favoring humanitarian societies of all kinds, whereby restrictions have been removed, powers enlarged, amounts which might be taken by gift or by will increased, renders it highly improbable that the legislature has taken the backward step claimed by contestants. No such construction should be placed upon the law unless clearly expressed by statutes, and surely there is no such clear expression.

The case of Vanderpoel v. Gorman, 140 N. Y. 563, is much in point. There is a general law in this state forbidding transfers or assignments of property by corporations in contemplation of insolvency. The court decided that although the law was of general application to all domestic corporations, yet it could not be applied to a corporation doing business within this state but organized under the laws of another state. Judge Peckham, writing the opinion of the court, says: "It is urged that such a policy is to be found in this same statute, even though it in terms applies only to domestic corporations. * * * It is thus seen that there are differences of a marked character between a domestic and a foreign corporation in relation to this subject. The differences are so marked that the statute regarding domestic corporations can furnish no proof as to the existence of a public policy which, in the case of foreign corporations, should stand in the place of and be equivalent to that statute." It is worth while to notice the fact that the effect of a general statute of this state upon a foreign corporation was the precise point in controversy in the case just cited. Judge Earl concurred in the decision and in the opinion, and the language employed by him in the Hollis case cannot be said to weigh against the positive decision in Vanderpoel v. Gorman. There is no real conflict between the two opinions. See Estate of Prime, 136 N. Y. 360; Cole v. Frost, 51 Hun, 578; S. C., 117 N. Y. 656.

The argument has been advanced by contestant that the courts have, in several cases, extended the restrictions of section 6 to

corporations not formed under the act of 1848. These cases were decided before the case of Hollis v. Drew Theological Seminary and are commented upon in the latter case. The doctrine of the Hollis case is in no respect antagonistic to the earlier cases and the distinction between them is perfectly clear.

In Lefevre v. Lefevre, 59 N. Y. 434, the will contains a bequest to a charitable society in New York incorporated in 1849. The charter of the society gave it power "to receive by gift or devise in the same manner and subject to the same restrictions as provided in the general laws for the incorporation of religious and benevolent societies." The will in controversy was made within two months before death and the decision is merely to the effect that the act of 1848 was the only law which could have been referred to in the charter, so that it was clearly the deliberate intention of the legislature to make the charter of the society in question subject to section 6 of the act of 1848.

The cases of Kerr v. Dougherty, 79 N. Y. 327; Stephenson v. Short, 92 id. 433, and the later cases of Fairchild v. Edson, 154 N. Y. 199, and People's Trust Co. v. Smith, 82 Hun, 494, are to the same effect and follow the Lefevre case.

I have already pointed out that the argument of contestant rests, as it appears to me, wholly upon the claim that recent legislation has so changed public policy with reference to bequests to corporations that the beneficiary under the will of Mr. Lampson must yield to that policy, and I have also shown that this claim depends on the expression of opinion in the italicized sentence in the Hollis case. And yet it seems to me that the learned counsel has, by insisting upon this claim, turned his own weapons against himself. Again, quoting from the Hollis case: "That cannot be enforced as public policy which the legislature one day prohibits in some cases, and another day permits in other cases," let us see if the same alternating policy has not been pursued since the enactment of the Membership Corporations Law as before. This law was passed May 8, 1895, and this is the date from which it must be claimed the legislative policy has been changed. During the present year several corporations have been chartered by the legislature under circumstances thoroughly repelling the idea that there is now a general public policy on the part of the legislature against bequests made within two months before death.

Chapter 99 incorporates the Sailors' Rest in the city of New York. This is clearly such an institution as might have been in-

corporated under the act of 1848. It is made capable of taking real and personal property not exceeding $500,000, and no restriction is placed on the manner of the devise. Chapter 278 incorporates the Lucy A. Wood-Rowe Memorial Association. This is a charitable society and is authorized to take devises or bequests without limitation or restriction except as to the amount.

Chapter 537 incorporates the House of Providence of Onondaga county. This is a strictly charitable institution and is authorized to take by devise or bequest with no limitation except as to amount. Section 5 of the act provides that the corporation shall possess the general powers and be subject to the general restrictions prescribed in the General Corporation Law.

Chapter 285 incorporates Grace Institute, a charitable society. The corporation is authorized to take by devise or bequest without limit or restriction, the society being "subject to the liabilities of corporations conferred by chapter 5 of the general laws, known as the General Corporation Law."

Chapter 333 is interesting and instructive as bearing on the question now at issue. The Young Ladies' Christian Association of the city of New York was incorporated by chapter 319 of the Laws of 1873. Section 5 of the act of incorporation provided: "The body corporate created by this act shall be capable of taking by devise or bequest subject to all provisions of law relating to devises and bequests by last will and testament," thus bringing it within the doctrine of the case of Kerr v. Dougherty, 79 N. Y. 327, and the other cases of like import, so that as this society existed under its original act of incorporation it could not have taken by bequest under will executed within two months of death. The amendatory act of 1897, above referred to, struck out the restriction originally contained in section 5, so that now the society may take by devise or bequest free from the restriction contained in section 6 of the act of 1848, and the amendment did nothing else.

Chapter 257 of the Laws of 1896 affords a precisely similar case. This was an amendatory act striking out the restrictive clause which, under the authority of Lefevre v. Lefevre and Kerr v. Dougherty, would have brought the society within the provisions of section 6, and leaving it free to take by bequest without reference to the two months' limit. To my understanding this law and the one last above referred to are of the utmost significance as repelling the claim that there is now a legislative policy against bequests made within two months of death, so powerful and far reaching

that the courts must extend it by analogy to an educational corporation of the state of Connecticut, containing no such restriction in its charter.

Among the laws just pointed out are two where the charter restricts the corporation formed thereunder to powers and liabilities conferred by the General Corporation Act, while five others contain no restriction. While I do not believe that the limitation can be traced through the Membership Corporations Law back to the General Corporation Act, and through that act back to section 6 of the law of 1848, it is worth while to note that if it should be claimed that the restriction contained in these two charters referred to does in fact mean that the societies incorporated thereunder, being subject to the limitations contained in the General Corporation Law, are, therefore, subject to the provisions of section 6 of the act of 1848, then it necessarily follows, and the conclusion seems to me to be irresistible, that the omission of this restriction from the charters granted to the Lucy A. Wood-Rowe Memorial Association and the other societies similarly incorporated, excludes them from any possible relation to the act of 1848, or any restriction or limitation by virtue of section 6. The counsel for contestant says in his brief: "The provisions of special charters of favored corporations are not to be considered on this question of the public policy of the state." In contrast with this statement stands the opinion of Judge Earl in Hollis v. Drew Theological Seminary, in which the fact that since the act of 1848 was passed a large number of institutions had been chartered by special acts, without being subjected to the restrictions of section 6, is pointed out as unmistakable evidence that no public or legislative policy existed which was opposed to bequests made within two months before the death of the testator.

These recent acts of the legislature answer more fully than any mere argument could do the claim that it is now contrary to public policy to permit gifts to corporations when made by will executed within the two months' limit. Surely "that cannot be enforced as public policy by the courts which the legislature one day prohibits in some cases, and another day permits in other cases."

But one more branch of the case need be discussed, and that is the point raised by counsel for the university that the devise of real property contained in the will is so inseparably connected with the bequest of personalty that this court may not exercise the power conferred by section 2624 of the Code, and determine the validity

of the bequests. In view of the disposition I have made of the case, the question might be deemed unimportant, except for the fact that it is jurisdictional. I have examined it with the care which its importance demands, with the conclusion that this court has the power to determine the validity of the bequests under this will. Discussion need not be entered upon further than to say that while I believe this court has full power to decide as to the legality of the entire bequest to Yale University there can be little doubt in any case with reference to the distinct gift of $150,000 to be devoted to the Lampson Lyceum.

I have not attempted to discuss this case in every aspect presented by the learned counsel for the contestant in his very able brief and oral argument. To have done so would have been to write a treatise, and yet that would afford no reason why the discussion should not be had if the case required it. The issue, after all, is one of statutory construction and may be confined within narrow limits. The decision which has been reached seems to me the only one which can be rendered with due regard to legal principles and without attributing to the legislature and the revisers a disposition to render complex and uncertain that which could as easily have been placed beyond controversy. I am fully satisfied that there has been no change in the legislative policy of this state with reference to the matters which have been discussed in this opinion, certainly none adding to the restrictions imposed upon charitable or educational bequests. I believe the purpose in retaining section 6 of the act of 1848 was as has here been pointed out, and that should the time ever come when the legislature shall see fit to further prohibit bequests made shortly before death, and to extend that prohibition to foreign corporations, it will not be done by complicated, tortuous, ambiguous and uncertain methods, but rather by direct and clear statutory provision.

The bequests to Yale University contained in the will of testator are, therefore, adjudged valid. The will is admitted to probate and letters testamentary will be issued to the executor and to the Mercantile Trust Company of the city of New York. This institution had been selected after consultation with the executor named in the will and with the university authorities before objections were filed, and is satisfactory to all parties concerned. The designation by the surrogate of a trust company in the city of New York as executor was required by the terms of the will.

Decreed accordingly.

Misc.] Surrogate's Court, Chautauqua County, December, 1897.

In the Matter of the Estate of BETSY TE CULVER, Deceased.

(Surrogate's Court, Chautauqua County, December, 1897.)

Administrators — Payment to a surrogate of a sum found due to the next of kin — Liability of the administrators to repay the next of kin, upon the default of the surrogate — Payment into court.

Proof that administrators, before the entry of a decree judicially settling their accounts, paid the amount found due in the proceeding by them, and distributable to the next of kin, to the surrogate by a check, that he receipted for it to them as paid him for the next of kin, and that the check was subsequently paid, does not protect the administrators, no decree having ever been entered, from the repayment of the amount to the next of kin, where the surrogate subsequently fails to account for it, as such a payment to him cannot, within the provisions of the Code of Civil Procedure, section 2537, be deemed a legal payment into court of the fund.

PROCEEDINGS to compel administrators to render and settle their accounts and pay to the petitioner his distributive share of the estate of the decedent.

Ottaway & Munson, for petitioner.

H. C. Kingsbury, for administrators.

WOODBURY, S. Henry Ten Hagen and Garret Te Culver were appointed administrators of the estate on the 23d day of January, 1893. In February, 1894, they filed their petition praying for a judicial settlement of their accounts. A citation was thereupon issued directed to all the next of kin, requiring them to appear before this court on the 7th day of May, 1894, and attend such settlement. The citation was duly served, and on or before the return day thereof the administrators prepared an account of their proceedings, in proper form of law, and filed the same with the surrogate. On the day of the return of the citation, the account was examined and agreed to, as presented, by the court and all the next of kin who appeared. It was found and agreed that there remained in the hands of the administrators the sum of $608.43, to be distributed in equal parts among the seven next of kin of the decedent, of which the petitioner herein was one, and all that remained to be done to complete the administration of the estate was

for the court to make its decree settling the account and directing distribution, and for the administrators to make such distribution in accordance with such decree. It appears, however, that no such decree was ever made or entered and the money has never been distributed. On the day of the settlement, viz., May 7, 1894, it appears that the administrators gave their check for the balance which remained in their hands for distribution to the surrogate, which check is in words and figures as follows, viz.:

"SHERMAN, NEW YORK, *May* 7, 1894.

"The State Bank of Sherman, Pay to the Order Daniel Sherman, Surrogate, Six Hundred Eight 43-100 Dollars.
"$608.43.
"(Signed.) "HENRY TEN HAGEN,
"GARRET TE CULVER,
"*Administrators of Est. Betsy Te Culver.*"

Across the back of this check appears the following indorsement:

"Pay to the order of W. O. Benedict, cashier.
"(Signed.) DANIEL SHERMAN, *Surrogate.*"

It is admitted that Mr. Benedict was, at that time, cashier of the Chautauqua County National Bank of Jamestown, New York. The petitioner does not dispute the fact that the check was paid, and it is to be regarded as an established fact in this proceeding that it was paid upon presentation. In this manner these administrators paid to Daniel Sherman, surrogate, the balance which remained for distribution among the next of kin. At the time of receiving the check Judge Sherman gave to the administrators his receipt for the moneys so paid to him, which is as follows:

"CHAUTAUQUA COUNTY, SURROGATE COURT.

In the Matter of the Estate
of
BETSY TE CULVER, Deceased.

"Received of Henry Ten Hagen and Garret Te Culver, administrators of the estate of Betsy Te Culver, deceased, $608.43, being balance of amount of personal estate of the said Betsy Te Culver,

deceased; being amount of total balance of personal estate of said decedent to be distributed to her next of kin, which said balance is found and determined upon judicial settlement of the accounts of said administrators, presented and filed by this Court, this 7th day of May, 1894.

"Dated MAYVILLE, N. Y., *May* 7, 1894.

"DANIEL SHERMAN,
"*Surrogate.*"

As matters were arranged and left on the 7th day of May, 1894, so they have ever since continued and still remain. As we have already stated, no decree has ever been entered and no distribution has ever been made.

On June last, Garret Legters, one of the next of kin entitled to a share of this money, presented his petition to this court praying that these administrators be required to render and settle their accounts, to the end that he should be paid his distributive share. A citation was thereupon issued to, and served upon the administrators, requiring them to appear at a time and place specified and show cause why the prayer of the petition should not be granted. The administrators appeared pursuant thereto, and the proceeding was, from time to time, adjourned until the 8th day of November, 1897, when the foregoing facts were made to appear. On that day this court made an order directing the administrators to render and file an account of their proceedings forthwith, and to appear on such day as the proceeding should be adjourned to, for the purpose of settling the same. The administrators adopted and reaffirmed their account filed in 1894 as their account in this proceeding, and in connection therewith made allegation and claim that by virtue of an order made in open court by Daniel Sherman, then surrogate, on the said 7th day of May, 1894, they paid into court, and to the said surrogate, the balance found due upon said account, being the said balance of $608.43. The proceeding was then adjourned to November 29, 1897. Citation was issued to all the next of kin, requiring them to appear on said day to attend such settlement, and by the service of said citation or by appearance all of the next of kin have been made parties to this proceeding. On the day last named the administrators, petitioner and several of the next of kin appeared. No new evidence was offered, but the admissions made and the evidence offered and received theretofore are,

under stipulation, to be considered as made, taken and received on that day, reserving to each party all objections and exceptions to the admission or rejection of evidence which were made or taken at the time it was offered.

Having stated the facts and history of the case as they have been made to appear, and the claims made by the administrators, we are brought to the consideration of the legal aspect of this interesting and unfortunate case. Interesting because it involves a legal question which has not been passed upon by our courts, so far as we are aware, and unfortunate because it is doubtful if this money can be recovered and innocent persons will have to suffer the loss. Upon the conclusions reached by this court, or some higher court on appeal, will depend the question whether the loss must be borne by the administrators or by the next of kin.

Before proceeding to the discussion of the legal questions involved, and to enable us to better understand the questions presented and reach just and proper conclusions, it may be well to state that there is no evidence that this money was paid to the surrogate at the request or by the consent of any of the next of kin, except that Henry Ten Hagen, one of the administrators who paid this money, is also one of the seven next of kin. Neither is there any evidence showing what has become of this money or that the administrators have made any effort to recover it.

It is urged that this money was paid in to the Surrogate's Court pursuant to an order made in open court, and that, in consequence thereof, the administrators are relieved from responsibility for it. The administrators rely upon the instrument which we have quoted, and referred to as a receipt, signed "Daniel Sherman, Surrogate," as constituting such order, and it is not proved or claimed that there was any other.

We cannot concur in the claim that this instrument constituted an order. It does not purport to be such. It contains no injunction, command or direction, but is simply what it purports to be, viz., a receipt for money, indicating the purpose for which it is received. Neither do we think the payment of this money to the surrogate can be regarded as a payment of the same into court. The statute (Code Civ. Pro., § 2537) clearly points out how, and in what manner, money is to be paid into court, and by necessary inference precludes any other method. To constitute a payment of money into court, under this section of the Code, it must be

paid to or deposited with the county treasurer to the credit of the fund or estate, unless the statute contains special directions for another disposition thereof, and there is no statute containing special directions in this class of cases. Prior to the enactment of this section of the Code, in its present form, in 1882, payment of money into a Surrogate's Court could be made, if the surrogate, by order, so directed, by paying the same to the surrogate, but the scheme and purpose of the amendment to that section of the Code in that year was to change this system by making the county treasurer the person to receive, in the first instance, all moneys in this class of cases which were to be paid into Surrogate's Court, and it eliminated from the section as it theretofore existed the right of the surrogate to make an order directing the payment of money unto himself.

We know of no right or authority vested in administrators to pay money into court, unless some statute specially permits or directs it, or unless authorized or directed so to do by order of the court, and we are of the opinion that this was not a case where the surrogate, or the Surrogate's Court, had authority to grant such an order. We shall have occasion to refer to this latter proposition hereafter in discussing the duties of administrators to make distribution, and will not further discuss the question in this connection.

Stripped of all its verbiage, the sole question to be determined in this proceeding is, did the payment of this money to Surrogate Sherman relieve the administrators from all further liability and responsibility concerning it? Or must they make it good to the next of kin?

Upon their appointment these administrators became vested with the legal title to the personal property of the decedent, as trustees, for the benefit, first, of creditors; and, second, of the next of kin. Redfield's Surrogate's Prac. 417; Blood v. Kane, 130 N. Y. 514.

The duty of administrators is to discover and collect the effects of the decedent, pay the funeral expenses and debts in their legal order, and then distribute the balance, if any, in accordance with the Statute of Distribution, among those entitled thereto. All this is to be done, however, under the supervision and direction of the Surrogate's Court, for upon this court is conferred jurisdiction to direct and control the conduct, and settle the accounts of administrators, and enforce the payment of debts and the distribution of estates of deceased persons. Code Civ. Pro., § 2472.

The statute provides that upon the judicial settlement of the account of administrators, if any part of the estate remains and is ready for distribution, the decree of the court must direct distribution thereof among the persons entitled thereto, according to their respective rights. Code Civ. Pro., § 2743. Then, again, section 2748 of the Code of Civil Procedure, which is to be read and considered in connection with the section last quoted, provides: "The decree must also direct the * * * administrator to pay to the county treasurer a * * * distributive share which is not paid to the person entitled thereto, at the expiration of two years from the time when the decree is made," etc.

Where the persons entitled to share in the distribution are all living, and known, and all of full age, as in the case under consideration, it seems clear to us that under these provisions of the statute a Surrogate's Court would have no authority to make an order directing the payment of such distributive share into court until the administrator had held the same for two years and made an effort to distribute in accordance with the directions of the decree. Again, reading and considering these provisions of the statute together clearly indicate that the act of making distribution is the primary duty of administrators, and not of the court, and nowhere will any warrant or authority be found for the court taking charge of the funds in the first instance for the purpose of making distribution in cases similar to the one under consideration. The court, by decree, determines the rights of the parties and directs the amount to be paid to each, but the administrators are to make the payment and distribution as so directed. Again, it will be seen, by the section last referred to, that, if the moneys are to be paid into court, they are to be paid to the county treasurer and not to the surrogate, and the distribution is to be made by the county treasurer under the direction of the court.

Now, if administrators, charged as they are in this case with the primary duty of making such distribution, intrust the funds to another, to make such distribution on their behalf, even though such person may be the surrogate, it seems clear to us that such person acts simply as the agent of the administrators, and in case of his failure to make payment and distribution to those entitled to the funds they are personally responsible for his default. They cannot delegate this power, even to a surrogate, and thereby relieve themselves from responsibility. The statute does not permit

administrators to do this, and no provision of the statute authorizes a surrogate in his official capacity to receive moneys or funds from administrators for distribution.

We have, therefore, reached the conclusion in this case that in receiving the money for the purpose of distribution the surrogate was acting in his individual capacity as the agent of the administrators, and was not acting within the scope of his duties or powers as surrogate, and we, accordingly, hold that the administrators are responsible for this money and must be charged therewith upon this accounting.

There is one other question raised by counsel for the administrators which had escaped our attention. It is claimed that the Chautauqua County National Bank was a trust depository designated by the comptroller for the deposit of trust funds, and that this money was deposited therein by the surrogate, and, consequently, had the effect of a payment into court.

It is sufficient answer to this proposition to say, that the evidence does not show that this money was so deposited. The only evidence bearing upon that proposition is the indorsement across the back of the check, making the same payable to W. O. Benedict, cashier, and also the fact that the check was paid. The fact that this indorsement appears upon the check would indicate that Mr. Benedict, as cashier, had something to do therewith, but it does not necessarily follow from that fact alone that the moneys were deposited with the Chautauqua County National Bank, but even if they had been placed there, as suggested, to the credit of Sherman as surrogate, we do not think it would relieve the administrators from liability. The next of kin have a right to look to the administrators for their money and are not called upon to trace it through irregular and improper channels.

A decree on judicial settlement will enter in this case charging the administrators with this money. We are satisfied that the administrators have acted in good faith, throughout, and costs will be allowed out of the estate to them as well as to the petitioner.

Decreed accordingly.

THE PEOPLE ex rel. ARCHIBALD McLANE *v.* EDGAR A. WHITNEY, as Sheriff.

(County Court, Franklin County, December, 1897.)

Criminal law — Denial of a trial by a legally constituted jury.

Where a person, charged with an assault in the third degree, demands, upon arraignment, a jury trial, and the magistrate, instead of delivering the venire to a constable, as required by the Code of Civil Procedure, section 2993, delivers it to a deputy sheriff, having by statute no authority in the premises, and the accused subsequently objects to the authority of the justice to draw and impanel the jury, to his jurisdiction, and to all the proceedings had before trial, the subsequent conviction of the accused is illegal, as he has been deprived of his right to a trial by a legally constituted and constitutional jury.

RETURN to writ of *habeas corpus.*

The relator was arrested for an assault in the third degree, and upon his arraignment before the magistrate demanded a trial by jury.

The justice drew a jury and gave the venire to a deputy sheriff to serve.

The counsel for the relator objected to the jurisdiction of the court, and the legality of the jury, and the authority of the justice after conviction to inflict any punishment for the offense.

N. H. Munsill, for relator.

F. G. Paddock, district attorney, and M. T. Scanlon, for defendant.

BEMAN, J. It appears by the return of the defendant in this matter that he holds the prisoner, the relator, in custody by virtue of a "certificate of conviction," signed and certified by the magistrate and which appears to be in due form of law and in full compliance with section 724 of the Code of Criminal Procedure. It serves the dual purpose of a certificate of conviction and a commitment of the relator to the custody of the defendant as sheriff of the county and keeper of the common jail. The return shows in addition that "a judgment of conviction was rendered against the

defendant of which said certificate is a copy." This return is traversed by the relator and thus two questions are raised for the consideration of this court.

It will not be necessary to discuss the question of the sufficiency of the commitment. The judgment being assailed we must consider whether the magistrate had jurisdiction to impose the sentence of imprisonment on the relator.

It appears that a jury trial was demanded by the relator and was had before the magistrate, but that the venire issued by him for the purpose of procuring a jury as provided by law was delivered, not to a constable as required by the Code of Civil Procedure, section 2993, but to a deputy sheriff, having no authority to execute the same or to summon the jurors. This may not have been fatal although the action of the justice was irregular in delivering the venire to a person other than a constable, and had the defendant (relator) deemed it proper to submit to a trial by jury as drawn and impaneled by the justice without objection he might not be permitted to avail himself of such irregularity in this proceeding, but, inasmuch as he did object to the authority of the justice to draw and impanel the jury, to his jurisdiction and to all of the proceedings before trial, he fully placed himself in a position to ask relief under this writ.

It clearly appears by the records of the magistrate that the relator was deprived of the right of a trial by a legally constituted and constitutional jury, and any conviction under such circumstances must be taken as without his consent, but in the face of his specific objections it was error and his conviction and sentence to imprisonment was without authority of law.

In view of these facts, it is my opinion that the writ should be sustained and the relator discharged from further confinement in the jail of the county.

Ordered accordingly.

THE PEOPLE ex rel. DANIEL SNYDER *v.* EDGAR A. WHITNEY, as Sheriff.

(County Court, Franklin County, December, 1897.)

Habeas corpus — Certificate of conviction.

A sheriff cannot hold a prisoner, as shown by the return to a writ of habeas corpus, upon a "certificate of conviction" and upon "a judgment of conviction," where it appears that the certificate of conviction contains no commitment, nor any statement showing that the magistrate had jurisdiction of the offense; nor is the sheriff assisted by the mere invocation of the judgment of conviction, where the fact of the judgment is not established by him.

RETURN to a writ of *habeas corpus* petitioning for the discharge of the relator from custody.

C. A. Burke, for relator.

F. G. Paddock, district attorney, for defendant.

BEMAN, J. The return of the sheriff to the writ issued in this matter showing that the defendant is held by him by virtue of "a judgment of conviction," and that said prisoner was committed to (him) me by virtue of the annexed "Certificate of Conviction" brings up two considerations, the question of a valid legal conviction as well as the question whether after legal conviction the magistrate has made a proper and legal commitment of the defendant to the sheriff of the county (he being the keeper of the common jail).

It does not appear by the return of the sheriff to the writ that he holds the defendant by any other mandate or authority than the certificate of conviction signed by the magistrate before whom the defendant was tried and convicted. That document is the only warrant for the detention of the prisoner. A certificate of conviction is not usually the authority given to the sheriff to receive a prisoner and keep him confined in the common jail, unless such document contain the further command to that effect and purpose. The certificate of conviction is practically the record of the court showing the trial and judgment. A commitment may be em-

bodied in a certificate of conviction provided such certificate contains sufficient authority to the sheriff to receive and detain the prisoner in conformity to the judgment or is properly certified by the magistrate before whom the trial was had, or, by the clerk of the county with whom such certificate should be filed within twenty days after such conviction is had. Code Crim. Pro., § 723.

There is no commitment in this case. The authority of the sheriff to hold and detain the prisoner is contained only in the certificate of conviction attached to the return and such certificate is defective in that it does not contain a statement of the magistrate showing his jurisdiction to try or to pass judgment upon the defendant after trial and conviction. The language of the magistrate is in these words: "The above-named Daniel Snyder having been brought before me, W. E. Hyde, a justice of the peace, of the town of Moira charged with the crime of assault in the third degree, against the person of Henry Delosh, by unlawfully, maliciously and violently striking and beating the said Henry Delosh."

There is an entire absence in the certificate of any statement showing the time when such assault was committed or where it was committed, and from anything that appears in the certificate, it might have been committed anywhere, outside of Franklin county, and at any time. We think such omissions render the commitment or certificate of conviction noneffective and void. Matter of Brown, 19 Misc. Rep. 692. Furthermore, if such certificate could or does operate as a commitment of the defendant to the sheriff of the county, as the keeper of the common jail, it is not in matter of form or substance as the statute provides. It is not certified either by the magistrate or by the clerk of the county. Code Crim. Pro., § 725. There being no commitment or *mittimus* before the court in this case, and the certificate of conviction forming part of the sheriff's return, containing no mandate to the sheriff to receive and confine the prisoner, and being otherwise faulty as herein stated, his detention in the common jail must be considered to such extent as without known authority of law and thus illegal.

But the return further shows that the defendant is held by virtue of a judgment of conviction. It is a settled question that the officer detaining a prisoner may always assert a legal judgment as his authority for the detention, but the invocation of a judgment in support of his position is not sufficient. He should be required to establish the fact of such judgment. In this case no valid judgment is shown by the defendant, nor is it impeached by the relator,

although he attacks or traverses the sheriff's return in that regard. It is plainly to be seen, however, that the sheriff's return is, as a whole, legally traversable, inasmuch as upon the face of the so-called certificate of conviction and commitment, *prima facie*, it does not appear that the court had acquired jurisdiction to render judgment against or pass sentence upon the prisoner.

For these reasons and from these views, the writ should be sustained and the relator discharged from further imprisonment.

Ordered accordingly.

JED. H. GRIFFIN, Respondent, *v.* WILLIAM BARTON, Appellant.

(County Court, Franklin County, December, 1897.)

1. **Summary proceedings — Petition by grantee of life tenant.**

   An allegation contained in a petition, made the basis of summary proceedings to dispossess a tenant, stating that the petitioner became the owner of the premises in question by a deed from a life tenant of them, and that the defendant was in possession under an alleged agreement for hiring made with the life tenant, is sufficient to establish the relation of landlord and tenant between the immediate parties to the proceeding.

2. **Same — Cannot be based on notice to quit, served by grantor after delivery of deed.**

   A grantee of leased premises cannot maintain summary proceedings based on a notice to quit, served on the tenant by his grantor, after the delivery of the deed.

3. **Juror — Competency — Opinion.**

   A juror who has formed an opinion is competent to serve where he states that, notwithstanding his existing opinion, he can render a verdict in accordance with the evidence given.

4. **Summary proceedings — Verification of petition.**

   A verification of a petition, made to institute summary proceedings, which alleges that the petition is true to the knowledge of the deponent "except as to the matters therein stated upon information and belief" is insufficient to confer jurisdiction.

SUMMARY proceedings to remove tenant on the ground that he holds over without permission of the landlord after expiration of his term.

J. P. Kellas, for appellant.

G. H. Main, for respondent.

Misc.] County Court, Franklin County, December, 1897.

BEMAN, J. These summary proceedings were instituted to recover possession of certain lands and premises described in the petition herein.

The petitioner, Jed. H. Griffin, respondent in this action, filed his petition with W. E. Hyde, a justice of the peace of the town of Moira, on the 27th day of March, 1897. The petition was verified under the form in use for the verification of pleadings in courts of record before the adoption of the present Code of Civil Procedure, and is as follows:

Jed. H. Griffin, being duly sworn, deposes and says, that he is the petitioner named in the above and foregoing petition; that the foregoing petition is true to the knowledge of deponent, except as to the matters therein alleged to be stated upon information and belief, and as to those matters he believes it to be true.

JED. H. GRIFFIN.

Sworn to before me this ——
day of March, 1897.

W. E. HYDE,
Justice of the Peace.

Upon such petition the magistrate issued his summons, directing the tenant, William Barton, to remove from said premises forthwith, or to show cause before him on the 31st day of March, 1897, at ten o'clock in the forenoon, why the possession of said premises should not be delivered to the landlord, the above-named respondent. That on said 31st day of March, defendant (appellant) appeared before said magistrate specially and moved for the dismissal of the proceedings upon the following grounds:

First. That the petition does not conform to section 2335 of the Code of Civil Procedure.

Second. That the application is not made by any of the persons designated in said section.

Third. That said petition does not state facts sufficient to give jurisdiction to the justice.

Fourth. That the petition does not state the facts constituting or pretending to constitute the interest of the petitioner in said premises.

Fifth. That the petition is not verified as required by law.

Sixth. That the sworn petition shows that the notice claimed to have been served upon defendant was null, nugatory and void in

that it was signed and given in behalf of one Mary Patten who, it appears from said petition, had no title to or interest in the premises at the time of the giving of said notice, namely, January 28, 1897.

Seventh. That the petition does not show that the justice had or ever acquired jurisdiction to issue the precept.

Eighth. That the petition does not show the continuation of a tenancy after March 1, 1894, nor does it show the kind or nature of any tenancy supposed to exist at the time of the application for precept.

Ninth. That the petition does not show that the relation of landlord and tenant exists between Griffin and Barton.

These objections were all overruled by the magistrate and the proceedings were adjourned until the 5th day of April then next. On the 5th day of April said case was called, all parties appearing, and defendant's motion to dismiss was then by the justice denied, whereupon defendant filed his answer as follows: First. He denies that he is holding over possession of the premises described without the permission of his landlord. Second. Denies that any notice of the termination of the supposed tenancy has been served upon him by his landlord or any other person authorized to give the same. Third. For a further and affirmative defense the defendant (tenant) alleges that he holds possession of said premises by virtue of the written lease set forth in the petition, the tenancy under which will not expire until March 1, 1898. Fourth. For a further defense defendant (tenant) alleges that he occupies said premises under a lease referred to in said petition, and which said lease was yearly renewed by said Mary Patten, for each of the succeeding years after March 1, 1894, and until March 1, 1898.

The answer was properly verified under the provisions of the Code of Civil Procedure.

Thereupon said magistrate, upon the request of the defendant, immediately issued a venire and a jury was summoned, from which six jurors were drawn who heard the case and thereafter rendered a verdict, among other things, that said tenant holds over after the expiration of his lease without the permission of his landlord, and that plaintiff is entitled to immediate possession of the premises.

The defendant appeals.

Mary Patten was the owner of a life estate involved in this proceeding. On the 16th day of January, 1897, she conveyed all of

her right, title and interest in the premises to the plaintiff, who, at that time, became the owner and succeeded to all of her rights in and to the property. Prior to that time a lease had been executed by and between the defendant Barton and Mary Patten for the occupancy of said premises for the period of five years. The terms and conditions of which lease were that either party might terminate the tenancy created by said lease by giving to the other party thirty days' notice of his or her intention so to do, previous to the expiration of any year subsequent to the first year. The lease being still in existence and binding upon the parties at the time of the conveyance to the plaintiff, the relationship of landlord and tenant was created between the lessee, William Barton, and the plaintiff, and was in existence at the time of the commencement of these proceedings.

This position is well sustained by the weight of authorities in this state, and the allegation in the petition in proceedings summary, for the removal of a tenant, that petitioner became the owner of the premises by deed from a person (naming him), and that defendant was in possession as tenant under an alleged agreement for the hiring with such person, the plaintiff's grantor, is sufficient to establish such relation. Earle v. McGoldrick, 15 Misc. Rep. 135.

If this be so, then the plaintiff, Jed. H. Griffin, was in a position to legally begin proceedings for the removal of a tenant from the premises conveyed to him. To do this he must first establish the fact that the thirty days' notice to quit, mentioned in the original lease, had been properly served upon the tenant, for without proof of the service of such notice such action would be premature, the justice would acquire no jurisdiction, and the proceedings for the removal of the tenant would necessarily be without authority, inoperative and void. Service of the notice was a condition precedent, the performance of which rested with the plaintiff. McDonald v. McLaury, 43 N. Y. St. Repr. 512. It is claimed by plaintiff that a notice was served upon defendant William Barton, in accordance with the terms and provisions of said lease, but it appears from the evidence that while the deed of conveyance to the plaintiff of the premises was delivered to him on the 16th day of January, 1897, such notice was only given by Mrs. Patten to the defendant on the 27th day of January of the same year, some ten days and more subsequent to the time of the transfer of all of her right and interest in the property to the plaintiff. Thus it appears that her said notice was given for the purpose of complying with the terms

of the original lease, but that the person so giving it had previously parted with her rights to the property and all her interest in and to the same, and hence had become and was a stranger to the subsequent transactions. I cannot conceive how it can be possible to assume that Mrs. Patten, under such circumstances, could have given any notice to the defendant which would have been a legal notice to quit under the statute, or that would in any manner be obligatory or binding upon defendant, or of which the plaintiff could possibly derive any advantage. Such a notice would be without authority, would carry with it no force and would create no obligation. The owner alone had a right to institute these proceedings, and the owner only should have given the notice to defendant Barton, contemplated by the original lease. He might have done this, and had he done so, without doubt these proceedings would have been proper and regular in that regard. People v. Anderson, 52 N. Y. 448; 12 Wend. 234. But, inasmuch as it appears that no notice was served upon Barton, as provided in the lease, but that the plaintiff relied solely upon the notice claimed to have been given by Mrs. Patten to Barton, the foundations were not legally laid upon which the magistrate could issue a precept requiring the defendant to remove from the premises. Such proceedings cannot be instituted by the original lessor of the property after such lessor has parted with the title to the premises. Miller v. Levi, 44 N. Y. 492; Boyd v. Sametz, 17 Misc. Rep. 728.

I shall not attempt to discuss at great length all of the other objections raised by the defendant, but it is proper that I note in passing the vital questions which bear upon the legality of this proceeding, and which, in my judgment, should be controlling.

The Code of Civil Procedure, section 2235, declares in specific terms who may be a party plaintiff to proceedings of this character, and as I have stated, plaintiff, as purchaser or owner of the premises, had a right to institute them, but in order to sustain them and confer jurisdiction upon the magistrate to issue an order for the removal of tenant upon the termination of the trial, all of his proceedings, from the beginning to the finish, must be strictly in compliance with the statute. Proceedings like these have always been held to be in derogation of common law, and in order that a party should not become a trespasser great care should be exercised, not only by the litigant but by the court, that every step taken in such proceedings should come within the provisions of the law which creates the remedy and authorizes the acts sought to be performed

under it. Coatsworth v. Thompson, 5 N. Y. St. Repr. 809, and cases cited.

The defendant could not be legally removed from the possession of said premises without due process of law. This is not only a statutory safeguard but a constitutional right.

The prerequisites of such a proceeding as this are: First. The petition duly verified, which should show that the plaintiff comes within the provisions of the Code and has a right to institute them. Second. The trial should be conducted with all legal formalities and with due regard to the statute in such case made and provided.

As to the second proposition. When a jury trial is had the selection of the jury should be made with great care, especially as to the competency of the individual juror to sit and render an impartial and unbiased verdict. It would seem that in this case some of the jurors were permitted, after objection thereto, to enter the jury box and sit upon the trial of this issue, who testified upon challenge that they had "formed an opinion," "had expressed an opinion," and "that it would require evidence to remove such an opinion from their minds." Such unqualified conditions as those at one time operated as a disqualification of a juror, for no juror should be considered competent who possesses a well formulated opinion, previously obtained, as to the merits of the case in an action he may be called upon as a juror to try. That is well-settled law and needs no comment, but the Court of Appeals has, on several occasions, held that where it appears from the juror's own statement that, notwithstanding such a previously formed opinion, he could enter the jury-box, sit in the case, try the action and an impartial verdict render according to the evidence, notwithstanding such an opinion he is not rendered incompetent. It is a question of fact after challenge and trial of a juror as to his competency, and in this case it appears from the evidence that the jurors admitted by the court under the objection of defendant's counsel were not disqualified. 136 N. Y. 71; 138 id. 595; 103 id. 497; 109 id. 351; People v. Carpenter, 102 id. 238; People v. Willson, 109 id. 345.

The rule which formerly existed under authority of the case reported in 16 N. Y. 501 (Canceim v. People), has long since been modified by the doctrine laid down in the cases above cited.

Before the argument of this appeal an application was made to this court (in this case) for an order requiring the justice before

whom the same was tried to make and file an amended return therein, adding to the jurat attached to the original petition the date upon which the same was claimed to be sworn to. Such motion was denied upon the ground that it was immaterial and unnecessary, that if material that such date be inserted in the petition the insertion thereof at that stage of the proceedings would not cure a defect if such an omission were a defect.

From the order denying the motion for such amended return the plaintiff appealed, and the Appellate Division sustained the decision of this court. In the opinion written upon such appeal by Mr. Justice Herrick he does not touch upon the question raised by the defendant that the petition was not verified according to law. It is clear to my mind from the language of the learned justice delivering such opinion, that he did not consider that question to its fullest extent and in all its bearings. The Code of Civil Procedure requires that such petition be verified in form and manner as pleadings are verified in courts of record. The verification to the petition in this case does not comply with the provisions of the Code of Civil Procedure, section 2235, nor the rules of practice of this court. Marchand v. Haber, 16 Misc. Rep. 320; Williams v. Eulhane, 22 N. Y. St. Repr. 42.

I am inclined to think that the defective verification attached to the petition, and to which objection was raised by the defendant before the commencement of the trial, was a fatal error, but I do not give such objection and error prominence in the consideration of the vital questions involved in this appeal, for it is my opinion that there are palpable mistakes, equally, if not more important, entering into the whole transaction, and which standing alone would be amply sufficient to justify the action of this court in reversing the judgment of the court below, namely: First. The want of notice provided for by the lease; and, second, the admission of the testimony of Mrs. Patten offered for the purpose of establishing the service of a notice. If offered for such purpose only, her testimony was immaterial and hearsay, and it was error on the part of the magistrate to allow the same to remain in his minutes after a motion had been made by the defendant's counsel to eliminate the same therefrom. The motion should have been granted and the evidence stricken out. If such evidence was not objected to when offered and received, the defendant was not precluded from making a motion to strike it out, if such motion was made at any time during the trial and before the case had been submitted to the jury.

Upon a careful examination of all of the cases cited by the plaintiff I do not find that his contention is sustained by the important case reported in 17 Misc. Rep. 728 (Boyd v. Sametz), except in so far as it holds by analogy that these proceedings may be maintained by the grantee of the lessor. In other respects it sustains the theory of the defendant.

From the foregoing considerations, it is my opinion that the verdict of the jury was contrary to law, and that the order made by the magistrate for the removal of the tenant was improperly granted; therefore, the judgment should be reversed, with costs, and it is so ordered.

Judgment reversed, with costs.

In the Matter of the Opening of ONEIDA STREET.

(County Court, Onondaga County, December, 1897.)

1. **Municipal corporations — Mortgagees of lands taken for a street opening are entitled to notice of the proceedings.**

   Where the charter of a city provides that, where lands are to be taken for a street opening, compensation shall be made to owners and also to persons having an interest in the property proposed to be taken, mortgagees of such lands are entitled to notice of the proceedings.

2. **Same — Insufficient provisions for notice to and the hearing of parties interested in a street opening.**

   Where the charter provides for no notice to any one, except such as might be derived from the publication and subsequent service, upon owners or persons having an interest, of a copy of a resolution of the common council declaring that it intends to take certain lands and to apply at a time and place named for the appointment of commissioners; where it requires no notice to be given that an owner or party in interest can appear at any time or place and be heard; where it provides for no notice of the proceedings before the commissioners or any opportunity to be heard; where no notice is required to be given of their report and there is no clear definition of the right of a claimant thereunder, the appointment of commissioners would violate the rule that private property cannot be taken for public use except upon just compensation and under due process of law.

APPLICATION for the appointment of commissioners to award damages to the owners and persons interested in the property proposed to be taken for the opening of a street (Oneida) in the city of Syracuse.

James E. Newell (Levi S. Chapman, of counsel), for petitioner.

Will S. Jenney, for the Syracuse, Binghamton & New York Railroad Company.

Ross, J. The Syracuse, Binghamton and New York Railroad Company described in the proceedings as the owner of property shown to be benefited by the proposed improvement appeared and urged several objections to the appointment of commissioners.

This corporation filed an affidavit of P. B. Cole, verified October 20, 1897, which shows that there are outstanding mortgages upon the property proposed to be taken, or some part thereof, which mortgages appeared of record at the time these proceedings were commenced, which facts are not denied by the petitioner's attorneys, and it is conceded that no notice has been served personally upon those mortgagees, or in any other manner than by publication in the official papers.

It is strenuously urged by the learned attorney for the railroad company that it is necessary to give notice to such mortgagees in some other manner, and by reason of such failure that these proceedings are rendered invalid, and that any person or corporation who has property and is liable to assessment for the expense of this street opening has a right to insist that the title obtained to the street shall be good as against all persons claiming any interest in the property.

Section 166 of the revised charter of the city of Syracuse provides in substance that when any street is laid out the common council shall require a survey of the same to be made and a map made of the same, and of all the property which, in its judgment, will be benefited by the proposed improvement, which map is to be filed as therein provided.

Section 167 requires that "the common council shall then, by resolution, declare its intention to take and describe the property proposed to be taken, and shall designate a time, place and court of record, when, where, and in which application will be made for the appointment of three commissioners to ascertain and report

the just compensation to be paid to the person or persons owning or having interest in the property proposed to be taken. Such resolution shall be published in the official paper, or papers, of the city, and a copy thereof shall be served upon each owner of any property shown to be benefited."

Section 168 specifies the duties of the commissioners when appointed which, in brief, are that they shall ascertain and award to the respective owners of the property to be taken, and to all persons or corporations interested therein, such damages therefor (deducting the benefits to their adjoining lands), as in the opinion of the commissioners shall be just compensation to them respectively. The provisions of the charter with reference to notice, and with reference to the rights of the owners, or persons interested, in the property proposed to be taken, are somewhat vague and uncertain. No provision is made for service upon a person whose property is to be taken other than service by publication, as before mentioned.

"A person cannot be deprived of property without due process of law, nor shall private property be taken for public use without just compensation." Fifth Amend., Const. U. S.

"Nor be deprived of life, liberty or property without due process of law, nor shall private property be taken for public use without just compensation." Art. 1, § 6, Const. N. Y.; Stuart v. Palmer, 74 N. Y. 183.

"But the legislature may prescribe the kind of notice and the mode in which it shall be given." Stuart v. Palmer, 74 N. Y. 183, 188.

It can be assumed that property cannot be taken for public purposes without giving the owner notice and an opportunity to be heard. It may also be assumed that such notice need not necessarily be personal. The legislature may provide, within certain constitutional limits, the kind of notice required. Constructive notice may be given by publication. Owners of Ground v. Mayor, 15 Wend. 374; Matter of Empire City Bank v. Insurance Co., 18 N. Y. 199, 215; Matter of Union E. R. R. Co., 112 id. 62; Lamb v. Connolly, 122 id. 531; Matter of Common Council of Amsterdam, 126 id. 158; Polly v. Saratoga R. R. Co., 9 Barb. 450.

The Matter of the Common Council of the city of Amsterdam is perhaps as nearly similar to the case under consideration as any case reported in this state. A notice in that case described the contemplated improvement in general terms and notified the owners

of the land to be taken that they might file with the city clerk claims for damages, and if such claims are made, application to the Supreme Court would be made at a time and place specified for the appointment of commissioners. On that application those who have filed claims may appear and have a right to be heard. After the appointment of commissioners a second notice is required to be given. They are directed to publish a notice of the time, place, when and where they will meet to make "such ascertainment and assessment." After meeting and making the award for damages they are required to file a report of their work with the city clerk, and a third notice is to be given, that the report of the commissioners has been so filed, and it may be examined by "all the persons interested." That it will be presented at a specified time to the Supreme Court for confirmation, and that "all persons" desiring to object may file their objections with the city clerk. Personal notice is also required to be given to those who appeared in the proceedings, and on the day appointed the court may confirm or annul the report.

In the case under consideration the only notice prescribed, so far as it relates to the owners of property proposed to be taken, is the passage of a resolution by the common council designating "a time, place and court of record, when and where and in which application will be made for the appointment of three commissioners to ascertain and report the just compensation to be paid to the person or persons owning, or having interest in the property proposed to be taken. Such resolution shall be published in the official paper or papers of the city." * * * Then follows a provision for service upon owners of property shown to be benefited. The difference between the provisions in the Syracuse charter and the Amsterdam charter are:

(A.) There is in the latter case a distinct notice to the owners and all persons interested that they may appear and file claims for damages, and if any claims are filed that they have a right to be heard upon the application for the appointment of commissioners. In the Syracuse case no notice in terms is given to any one except such notice as may be derived from reading a public resolution of the common council declaratory of its intention to take certain property, and to apply at a certain time and place for the appointment of commissioners. No indication that any one interested in the proceedings has the right to intervene at any time to protect

his rights. No suggestion that such a person has the right to be heard upon any of the proposed proceedings.

(B.) The Amsterdam statute provides for a second notice of the time and place where the commissioners will meet for the purpose of ascertainment and assessment. No such provision in the Syracuse statute.

(C.) The Amsterdam statute requires a third notice to be given after the commissioners have made their report that it may be examined by "all persons interested," that it will be presented for confirmation, and that "all persons" desiring to object may file their objections with the city clerk. Also requires personal notice to be given to those who have appeared in the proceedings. On the day appointed the court has "to hear the parties in regard to said report, and may confirm or annul it." This notice runs to all persons interested, and any person can ascertain by an inspection of the report of the commissioners on file whether he is interested, and if he is he has a right to file objections and assert his rights. No such provision is contained in the Syracuse statute.

While the legislature can prescribe the kind of notice, there must be some notice, and there must also be an opportunity for a hearing. It is not enough that those interested may by chance have notice, or that the proceedings, in fact, have been fair. Stuart v. Palmer, p. 188.

It is not enough that the statute gives any person deeming himself aggrieved the right to appeal. § 169. He must first be brought regularly into the proceedings to bind him. If he has not received a sufficient notice he has not been given an opportunity to be heard; he need not act. He need not force himself into a proceeding to which he has neither been invited or given any definite rights if he appears.

To summarize, no notice in terms of any contemplated proceedings are given to an owner of property to be taken. No notice that he can appear at any time or place and be heard. No notice of the proceedings before the commissioners, or of an opportunity to be heard before them. No notice of the report of the commissioners, and no clear definition of the right of a claimant thereunder. A mortgagee of lands proposed to be taken is entitled to notice whether he is strictly considered as an owner or not. The statute clearly contemplates compensation to persons other than the owners of the fee, and if persons having an interest in the property are to receive compensation, how can their rights be protected if they do not re-

ceive notice of the proceedings affecting their rights, and if they have no opportunity to assert and enforce such rights.

Pratt v. Bright, 29 N. J. Equity, 128, holds that the persons interested include a mortgagee of the lands condemned.

The greatest injustice might be perpetrated upon a mortgagee. Suppose that the mortgagee only has a lien upon the property proposed to be taken, or that the property so taken bears such relation to the balance of the property covered by the mortgage that the use for a street would render the balance covered by the mortgage valueless, and the property taken bears such a relation and such a proportion to the entire property owned by the owner in fee (and part of which is not subject to the mortgage) that the owner's property is benefited by the opening, or the benefits even exceed the value of the property taken, in which event if the mortgagee is bound by the proceedings he has not even the chance to apply to the courts for the money awarded. Without notice of any kind; without an opportunity to be heard, the property upon which he had security of record is taken, as it seems to me, without due process of law. A mere statement of this situation is as good an argument as can be made against such a doctrine. If the mortgagee's right cannot be interfered with, except he has notice and an opportunity to be heard, then the title to the street opened without such notice would be defective, and cannot be such a title as those whose property is assessed to pay for it have a right to insist shall be obtained. Pratt v. Bright.

The provisions of the Code of Civil Procedure for the condemnation of real property sustains the view herein taken as to the right of a mortgagee.

Section 3358 defines the term "owner" to mean "all persons having any estate, interest or easement in the property to be taken, or any *lien*, charge or *incumbrance thereon*."

Section 3360, subdivision 4, requires that the names and residences of the owners of the property shall be given. Then follows provisions relative to service, to appearances, and section 3365 provides that an owner (which includes a mortgagee) of the property may appear and interpose an answer.

For the foregoing reasons I think that the mortgagees of the property proposed to be taken are entitled to notice, and for a failure to give such notice these proceedings must be dismissed.

The contention of the railroad company that the requirements of the charter, section 29, requiring the calling for the ayes and nays

upon every resolution authorizing the expenditure or collection of money, or the making of local improvements, or repairs, was not complied with, presents also a question of serious doubt as to the regularity of this proceeding. In the Matter of the City of Buffalo, 78 N. Y. 362.

But it is unnecessary to consider this objection. The application for an appointment of commissioners is denied and the proceeding dismissed. Order to be settled, if not agreed upon by the attorneys, and upon the settlement of the order the question of costs may be presented.

Ordered accordingly.

WILLIAM O. CORNING and all Other Stockholders and Creditors of the Harlem Storage Warehouse & Express Company, who may in Due Time Elect to Come in as Plaintiffs and Contribute to the Expense of this suit, Plaintiff, *v.* JOHN T. BARRETT, JOSEPH C. MONTAYNE, DANIEL W. KING, WILLIAM H. CLARK, ORVILLE R. BARRETT, ALBERT E. CRABTREE, and JOSEPH B. PLATT, Defendants.

(Supreme Court, Kings Special Term, January, 1898.)

1. **Business corporations — Action by stockholder for torts of its directors — Corporation a necessary party — Request that directors sue.**

Where the complaint, in an action brought by and in behalf of a stockholder and of all other stockholders and creditors of a business corporation, alleges that the defendants, the directors of the corporation, at a time when it was insolvent, wrongfully and fraudulently transferred its property to themselves or to preferred creditors, and demands, besides damages, an accounting, the action must be deemed equitable in its nature, and cannot be maintained where the corporation is not made a party, and where the refusal, upon request, of the directors to bring the action is not alleged.

2. **Same — A complaint showing no damages at law.**

Assuming that the action is intended as one at law to recover damages, an allegation that the directors, at a time when the corporation was insolvent, transferred its property to themselves or others, does not show that the plaintiff, a stockholder, was damaged thereby.

By the title of the action, and by allegations in the complaint, the plaintiff professes to sue in behalf of himself as a stockholder of a named business corporation, and of all other stockholders and all creditors of the said corporation. The defendants were the directors of the said corporation. The complaint alleges that the plaintiff was from the beginning and is the owner of 180 shares of the said corporation of the par value of $18,000, and as a conclusion from this that he was and is a stockholder and creditor for that sum; in general terms, that on July 29, 1893, the said corporation being "insolvent and in contemplation of insolvency", the defendants conspired to cheat and defraud the plaintiff, and wrongfully and unlawfully caused the property and franchise of the said corporation "to be transferred to themselves, and to be so dealt with by said defendants as to carry into effect a conspiracy" to defraud the stockholders and the said corporation, to the damage of the plaintiff in the sum of $18,000, "and to the great damage of the other stockholders and creditors of the corporation"; next, that at the said time the defendants "unlawfully made conveyances, assignments and transfers" of the property of the said corporation with the intent of cheating and defrauding the plaintiff "and of giving a preference to particular creditors" of the said corporation; that by reason of the said acts of the defendants the said corporation became insolvent, by reason of which the plaintiff has sustained loss in the sum of $18,000. No particular conveyances, or facts of fraud or conspiracy are alleged. The judgment demanded is "for the said sum of $18,000" for the plaintiff, and that the defendants be compelled to account for their said acts, and to pay to the said corporation "or to its creditors", any sum they may be charged with, and for any further relief found to be just.

The complaint is demurred to on the grounds that it does not state facts sufficient to constitute a cause of action, and that there is a defect of parties defendant, in that the corporation is not made a defendant.

J. J. Bennett, for plaintiff.

W. H. Sage, for defendants.

Gaynor, J.: Counsel for the plaintiff treats the action as one for damages; counsel for defendants, as one for equitable relief. The complaint is so drawn that it is disputable which it is for. It is a

jumble the like of which has come to be far too common. It is stamped as a complaint in equity by being brought in behalf of the plaintiff and all other stockholders and all creditors of the corporation, as shown by the title and by allegations of the complaint. Such an action cannot be at law. The accounting asked for also shows the same. The action being in equity, the defendant corporation is a necessary party defendant, for the accounting would have to be to it. Moreover, there is no allegation that the present directors were requested by the plaintiff to bring the action and refused. A stockholder may not bring an action as a champion of the corporation unless the directors refuse to do so, and thus commit a breach of duty. If, however, the defendants continued to be the directors of the corporation up to the time of the commencement of the action, no such request was necessary. It is never necessary to make such a request of the directors who commit the breaches of trust complained of, for the law does not require that which is idle or absurd. It would not be sufferable for directors to bring and pretend to prosecute such an action against themselves. But the court is not to presume that the defendants continued as directors since 1893, for there is an election of directors each year. If the action could be deemed at law, for $18,000 damages, the complaint does not state facts sufficient. It alleges that when the directors transferred the property to creditors, or to themselves, (or to both, if that be what is meant), the corporation was insolvent. That being so, there is no fact alleged to show how the stockholders were damaged thereby, for they would get nothing no matter how carefully the assets might be liquidated and distributed. Later on the complaint alleges that the corporation was made insolvent by the said acts of the directors; but the plaintiff has to be held to something. The demurrer is sustained.

Demurrer sustained.

HENRY HAYNE, Plaintiff, *v.* THOMAS SEALY, Defendant.

(Supreme Court, Kings Special Term, January, 1898.)

Partnership — The administrator of the deceased general assignee of a firm takes no title to its assets — Trademarks.

The administrator of the deceased general assignee of a firm takes no title to the firm assets, and hence a former partner of the firm, who claims title to one of its trade-marks, under a transfer made by the

administrator without authority of the court, cannot maintain an action to restrain its use by his partner in a new firm, formed after the old firm had made a general assignment.

ACTION to restrain the use of a trade-mark. It was owned by the firm of Blossom, Hayne & Co., of which the plaintiff was a member, and used in their business. They made a general assignment under the statute for the benefit of creditors in March, 1883. One of the creditors in behalf of himself and all other creditors brought in 1889 the usual suit for an accounting and distribution, and to have the assignee charged for losses, etc. The assignee thereafter died, and his administrator was substituted as defendant. No successor to the assignee was appointed. The suit went to judgment in December, 1897, and distribution was made thereunder. The assets were insufficient to pay the creditors in full. Pending such suit the said administrator conveyed the said trade-mark to the plaintiff's wife without consideration by a written instrument, dated October 19, 1896. This was done without any direction or subsequent approval of the court. After the said general assignment the plaintiff immediately continued to carry on the same kind of business as the said firm, with the word agent after his name a part of the time, all the while using the trade-mark in such business as apparent owner thereof, up to June 30, 1894, when he went into partnership with the defendant to carry on the same kind of business. By the written articles of copartnership he transferred all the assets and rights of his business to the new firm. It was dissolved on June 21, 1897, and on the same day after the dissolution the plaintiff's wife assigned the said trade-mark to him, and he claims thereby to be the sole owner thereof.

A. J. Perry, for plaintiff.

Mark M. Schlesinger, for defendant.

GAYNOR, J.: The administrator of the deceased assignee did not succeed to his title to the assigned estate. She only succeeded to his individual estate. At common law an executor of an executor succeeded to the latter's right, title and duties as executor, excepting personal trusts; but the rule was not so in the case of administrators (2 Bl. Com. 506; Perry on Tr., §§ 264, 344); nor did an executor any more than an administrator succeed to the trusts of

his testator which did not relate to his own estate. Under our statute there is no succession of executors as at common law. The surrogate appoints an administrator with the will annexed to succeed a deceased executor. There is no rule or analogy to support the claim that the title and duties of the assignee passed to his administrator. The general assignment statute provides for the appointment of a successor. It permits the executor or administrator of a deceased assignee to be made a party to an accounting suit under the assignment, but that is only because he has to account for and turn over all of the money and effects of the assigned estate which come into his hands from the possession of his decedent.

Judgment for defendant.

EDGAR W. LEVEY, Plaintiff, *v.* THE TRIBUNE ASSOCIATION, Defendant.

(Supreme Court, New York Trial Term, January, 1898.)

Practice — Striking case from calendar for irregularity — Laches.

The delay of a defendant, in waiting until a case has appeared for the second time on the calendar, before moving to strike it therefrom for the failure of the plaintiff, after the service of an amended answer, to serve a new notice of trial and file another note of issue, is a waiver of the irregularity.

MOTION to strike cause from the calendar.

Henry W. Sackett, for motion.

W. F. Severance, opposed.

GILDERSLEEVE, J. This is a motion to strike the cause from the calendar for the reason that no new notice of trial has been served and no note of issue filed since the service of the amended answer. See Yates v. McAdam, 18 Misc. Rep. 295. It seems, however, that when the case appeared on the calendar, on November 5, 1897, some time after the service of the amended pleading, the plaintiff moved to put over the case to December 24, 1897, and that the defendant's representative, who was in court to answer the call of the calendar, consented to this disposition of the case, or, at least, made

no opposition thereto. Subsequently, when the case again appeared on the calendar, on December 24, 1897, defendant made this motion to strike the cause from the calendar. It is my opinion that the defendant's *laches* in waiting until the cause had appeared for the second time on the calendar, before taking advantage of plaintiff's failure to comply with the rule laid down in Yates v. McAdam, *supra*, operate as a waiver of the irregularity charged. See Mangone v. Met. St. Ry. Co., 21 Misc. Rep. 565; Stanfield v. Stanfield, 21 id. 409. The motion must be denied, and the cause set down on Friday's calendar, January 7, 1898.

Motion denied.

IRVING D. SMITH and MAGGIE E. SMITH, his Wife, Plaintiffs, *v.* WILLIAM GILLIATT et al., Defendants.

(Supreme Court, Orange Special Term, January, 1898.)

Partition — A bequest which permits the life tenant to use the principal — A remainderman allowed his payment of the funeral expenses of the life tenant.

Where the will of a testator bequeaths to his wife all his real and personal property during life and directs that if, at her death, "anything should be left after all her just debts are paid," the same should be divided equally between his three children, the bequest authorizes the wife to use the principal, if the income proves insufficient for her support, and, therefore, a child who has paid the funeral expenses of her mother, is entitled to be allowed, in an action brought to partition the real estate of the testator, the amount of this payment, as it may be deemed to represent one of the "just debts" of the life tenant.

ACTION for the partition of real estate.

Joseph W. Gott, for plaintiff.

Garrett Z. Snider, for defendant, William Gilliatt.

HIRSCHBERG, J. This action partitions real estate of which John Gilliatt died seized. By his will he devised his property to his widow for life in the following terms: "To my wife Bridget Gilliatt, I give and bequeath all my property both personal and real during her lifetime, and at her death, *if anything should be left after all her just debts are paid*, to be divided equal between my three children, viz., Matilda, wife of Charles Lewis, Catharine Gilliatt and William Gilliatt." On the death of the widow, her

funeral expenses, amounting to $130, were paid by her son, the defendant William Gilliatt, and he asks to be allowed that sum out of the proceeds of the sale, on the theory that it is a charge upon the real estate. The referee appointed to ascertain the rights and interests of the parties rejected his claim, and the report was confirmed without opposition, but I think the court has jurisdiction to entertain the question as now presented on motion for final judgment, and to modify the order confirming the report and the interlocutory judgment, if the conclusion of the referee was erroneous, without subjecting the parties to the delay and expense of an appeal.

It seems to me quite clear that the testator intended to charge his property with the payment of his wife's funeral expenses. In a restricted sense the word "debts" would embrace only obligations resulting from the widow's contracts. But the word is not used in the will in this restricted sense. The intent of the testator controls, and it was evidently his intention that should the income of his estate prove insufficient for his wife's support, she should have recourse to the principal, and that the children named should take only what might be left by her at her death. He must be presumed to have contemplated and to have thus provided for her decent interment after her decease, and to have included the necessary expense of such interment in the phrase "all her just debts." Under the most strict construction it must be conceded that she could have herself contracted for her funeral expenses, and that the expense would then have been a legal charge upon the land. If this be so, it follows that such expenses were included in those contemplated by the testator, and that, therefore, a child, who after her death paid the funeral bill, is entitled to be reimbursed. In effect, her husband left her his entire estate to be used so far as her comfort and necessities required, and the children were made legatees only in the event that something should be left after his wife's death. As was said in Chapple v. Cooper, 13 M. & W. 259, "There are many authorities which lay it down that decent Christian burial is a part of a man's own rights; and we think it is no great extension of the rule to say that it may be classed as a personal advantage, and reasonably necessary to him. His property, if he leaves any, is liable to be appropriated by his administrator to the performance of this proper ceremonial. If then this be so, the decent Christian burial of his wife and lawful children, who are the *personae conjunctae* with him, is also a personal advantage and reasonably necessary to him." See, also, Allport v. Jarrett, 61 Hun, 447.

Provisions in a will intended for the support of a wife receive the most favorable construction to accomplish the purpose intended. Thurber v. Chambers, 66 N. Y. 42; Stimson v. Vroman, 99 N. Y. 80. The testator knew that it would be necessary to bury his wife after she died. He directed, in effect, that all his property should be devoted to her uses and needs; and that if anything was left by her unexpended it should go to the children. And the provision that this remainder should be only what was left after the payment of all her just debts, is couched in terms which to the lay mind would naturally include the funeral bill, and which must include it under a construction which recognizes the objects sought by the testator in subjecting his entire estate to meet all the necessities of his wife from his death to her interment.

The final judgment should provide that the funeral bill is a charge upon the real estate to be paid before division of the funds arising from the sale. The interlocutory judgment will be modified in accordance with this opinion. Costs and allowances to be adjusted on settlement of the decree.

Ordered accordingly.

HULBERT BROTHERS & Co., Plaintiff, *v.* JOHN T. HOHMAN, Defendant.

(Supreme Court, Onondaga Special Term, January, 1898.)

Pleading — Amendment — Substitution of its receiver for a company — Inadvertence.

The court has power, under Code of Civil Procedure, section 723, to amend the summons and complaint in an action, begun in the name of a company, by substituting its receiver, in whom the cause of action was vested when the action was begun, as the substitution does not bring in a different party and as a mistake, caused by mere inadvertence, should be remedied.

MOTION to amend summons and complaint herein by making Frederick P. Forster as receiver of Hulbert Brothers & Company instead of said Hulbert Brothers & Company, plaintiff.

Irving G. Hubbs, for motion.

J. R. Shea, opposed.

HISCOCK, J. It seems that at the time this action was commenced the above-named Forster had been appointed receiver of Hulbert Brothers & Company and, therefore, the cause of action was vested in him. Through inadvertence the summons and complaint were entitled in the name of the company as plaintiff, and this application is now made to change the name of the plaintiff accordingly.

I think it is within the power of the court to grant the application and that the amendment should be allowed. Code, § 723; Heckemann v. Young, 18 Abb. N. C. 196; Kaplan v. N. Y. Biscuit Co., 5 App. Div. 60.

As was suggested in Dean v. Gilbert, 92 Hun, 427, the amendment may be regarded almost as a correction of the name of the plaintiff rather than the substitution of an entirely distinct and different party from that named and referred to in the allegations of the complaint.

The suggestion made in opposition to the motion that it does not sufficiently appear that the receiver is a party to this application or represented thereon by plaintiff's counsel is answered by the fact amongst others that part of the moving papers are the proposed amended summons and complaint duly verified by Mr. Hubbs as attorney for the receiver and in which he specifically states that he is such attorney.

The motion is, therefore, granted, with $10 costs to abide event.

Motion granted, with $10 costs to abide event.

BLANCHE M. STEELE, as Administratrix, Etc., of HERBERT A. STEELE, Deceased, Plaintiff, *v.* THE CONNECTICUT GENERAL LIFE INSURANCE CO., Defendant.

(Supreme Court, Onondaga Special Term, January, 1898.)

Life insurance — Actions in this and a foreign state to recover on policies pledged in the foreign state — Pledge redeemed by foreign administrator — Priority in taking jurisdiction.

Where the insured under and assignee of two policies, issued by a foreign life insurance company, pledges them in the foreign state to the insurer as collateral security for loans made by it to him, and subsequently removes to and dies within this state, and the administrator

of his estate, duly appointed in the foreign state, advances moneys, redeems the policies from the insurer, which has at all times since the loan been in possession of them, and receives from it the amount due upon one of them, he may hold this payment as against an administratrix of the insured, duly appointed in this state and who, at the time of the payment in question, had already claimed the proceeds of the policies, had not offered to redeem them, but had begun an action to recover the proceeds of both, of which action the insurer had no notice when the payment in question was made; nor can the domestic administratrix maintain so much of her action as affects the policy not yet paid by the insurer, as both policies are subject to a redemption which she has not offered to make, and are held and owned by the insurer in the foreign state, whose courts were the first to take jurisdiction of the estate of the insured.

THIS action is brought by plaintiff to recover upon two policies of insurance issued by the defendant upon the life of the deceased. The only defense urged upon the trial by the defendant was that it has already paid the amount of one policy to an administrator of the deceased appointed in the state of Connecticut, and is defendant in a suit brought by him to recover the amount of the other policy. The facts in detail sufficiently appear in the opinion.

Frank C. Sargent and William Kennedy, for plaintiff.

C. H. Lewis, for defendant.

HISCOCK, J. The defendant is a corporation organized under the laws of Connecticut and having its principal or home office in Hartford in that state. The deceased and insured Herbert A. Steele, at the time of the execution of the policies in question was a resident of Connecticut. February 25, 1887, the defendant issued the first of the policies in question for $2,000, payable to "Minnie W. Steele, wife of the said insured, if surviving, and if she be then dead to the legal representatives of the insured." It was payable at the home office of the company. October 18, 1890, the said wife, Minnie W. Steele, assigned her interest in said policy to the insured.

The second of said policies for $3,000 was issued by the defendant December 2, 1887, and made payable to "the legal representatives of the insured at the home office of the company." January 6, 1888, the insured assigned his interest in said policy to his mother,

Sarah H. Steele, who was a resident of Connecticut. She in turn, October 23, 1893, reassigned the policy to the insured.

Upon the dates October 23, 1893, and March 6, 1894, respectively, after he had become vested with the entire ownership thereof, the insured assigned said policies to the defendant, the one for $3,000 upon a loan of $600, then made by said defendant, and the one for $2,000, upon a loan for $400, then also made by it. The assignment in each case is absolute upon its face. It does not appear therefrom that the same is as security for the loan then made, but such, beyond any question, was the fact. The policies themselves at said dates, respectively, were delivered to and left with, and until after the death of the insured, as hereinafter stated, continuously remained in the possession of defendant at its home office, said loans not having been paid up. The insured having become divorced from the wife mentioned in one of said policies, came to Syracuse where he married plaintiff and continued to reside for two or three years before his death, which occurred at said city on or about February 4, 1897.

The decedent left him surviving in Connecticut a son and mother, and also had in said state, at the time of his decease, some real estate, and possibly some personal estate outside of the policies in question, and also quite a large amount of debts, which have been presented to his administrator in that state. February 4, 1897, petition was made in said state for letters of administration upon his estate, and such proceedings had that thereafter and on or about March 9, 1897, letters were issued to the mother, Sarah H. Steele, and one George D. Bissell, who thereupon gave bonds and entered upon the discharge of their duties as such. Later this plaintiff appeared in Probate Court where said letters had been issued by her attorneys, and petitioned to reopen the decree granting letters to said persons, and upon her application such proceedings were had that upon said date another decree was made, removing the mother and constituting and appointing sole administrator of said estate said Bissell, who thereafter continued to act as such. In the meantime, and upon March 2, 1897 (and subsequent to the presentation of the petition for administration in Connecticut and prior to the decree granting such administration), the plaintiff had been appointed administratrix upon the estate of said deceased in the county of Onondaga, where he died.

April 19, 1897, the Connecticut administrator, presenting his certificate of appointment as such, appeared at the home office of

defendant and offering to pay the loans by it made, as hereinbefore stated, demanded the said policies. The defendant, requesting time for consideration and consultation with its counsel, the same was allowed, and said administrator again appeared on April 22d and renewed said offer and demand with the result that he paid to the company the amount due on said two loans, $1,000, with accrued interest, and the company surrendered to him the policies. He then also demanded of defendant payment of said policies. The defendant paid him the amount due upon the $3,000 policy, but did not pay the other one, and thereafter and on or about May 10th, action was commenced by him upon said policy against said defendant, which is now pending in the state of Connecticut.

After her appointment as administratrix, plaintiff, through her attorney, had some correspondence with the defendant about these policies. There was some communication about paying the loans for which they were held, but as a matter of fact no sufficient or legal offer or tender of the amount due upon said loans was ever made by plaintiff to said defendant. Something also was said in said correspondence in behalf of plaintiff about suing defendant, and some days before the Connecticut administrator called upon the defendant as above stated (April 19th), plaintiff's attorney wrote that suit had been commenced upon said policies, but at said date one of said policies was not due, and such suit was not, as a matter of fact, commenced. April 21st, however, suit was actually commenced by plaintiff against defendant upon said policies by service in this state upon the person designated by law. Actual notice of such commencement, however, was not brought to defendant until April 23d. Therefore, on April 22d, when defendant delivered to the Connecticut administrator the policies in question and subsequently paid one of them, while it knew that there was an administratrix in this state claiming said policies, it did not know that suit had been commenced thereon, and there is nothing to indicate that at said date, or until some time thereafter, the Connecticut administrator knew that anybody else had commenced a suit upon or made claim to the proceeds of said policies. It does not appear that he knew that any administrator other than himself had been appointed.

There is no evidence that defendant in delivering said policies and in making payment as it did acted in any way in collusion with the Connecticut administrator, and with any other purpose than to legally and properly discharge its obligations.

It appears in the case that in addition to her appearing by attorneys in Probate Court at the time when Mr. Bissell's coadministrator was removed and himself constituted sole administrator, the plaintiff at some other time appeared therein and secured a decree authorizing and directing such Connecticut administrator to pay her a certain allowance from time to time.

Under these facts the plaintiff urges that she should be allowed to recover of defendant in this action upon both policies, notwithstanding the fact that it has already actually paid the amount of one thereof to the Connecticut administrator and is defendant in a suit brought by him upon the other one. I do not think that she should be so allowed to recover upon either policy.

No issue was, or upon the evidence in the case, could be raised over the legality of the appointment both of the plaintiff as administratrix in this State and of Mr. Bissell in Connecticut. It is to be assumed upon the evidence that the court of each state had jurisdiction to make the appointment which it did.

Neither is the issue in the action, in my judgment, exactly or fully embraced in the question whether the obligation of the defendant represented by these two insurance policies would, under ordinary circumstances, be regarded as an asset in the state of New York or in the state of Connecticut. But the question is whether under all of the circumstances of this case, this court has the right to or should exercise its jurisdiction to compel defendant to pay to this plaintiff the amounts of such policies as against the payment already made by it of one thereof to the Connecticut administrator and the suit by him pending against it upon the other one.

The obligation evidenced by a policy of insurance is a simple contract debt and is assets where the debtor resides. Furthermore, for the purpose at least of establishing the situs of such an asset for purposes of administration, a corporation is to be regarded as being a resident of any state wherein it is represented by an agent upon whom process may be served. So far, therefore, as the location of an asset, represented by a policy of insurance, is to be determined by the mere residence of the debtor, it may exist in several different states, and the courts of such different states may have concurrent jurisdiction of the collection thereof for purposes of administration. Sulz v. Mutual R. F. L. Assn., 145 N. Y. 563, 571-2.

There is some question under the authorities how far this location of such an asset by reference to the residence of the debtor and the

otherwise concurrent jurisdiction of the courts of several states in the case of a corporation having a residence therein, through representation by agents as above stated, is affected by the physical location of the policy of insurance. Independent of the decisions in other states, there are some in New York which seem at least to intimate that the courts of the state wherein the policy of insurance was found, would have precedence in jurisdiction over those of another state where the defendant had a concurrent residence. Such are the cases of Holyoke v. Union Mutual Life Ins. Co., 22 Hun, 75 (and affirmed without additional opinion, 84 N. Y. 648), and of Morrison v. Mutual Life Ins. Co., 57 Hun, 97, which does not seem to have been taken to the Court of Appeals. Upon the other hand, the case of Sulz v. Mutual R. F. L. Assn., above cited, in reviewing the foregoing cases, intimates quite decisively (page 572), that the mere presence of the policy of insurance in one state would not give the courts thereof precedence, and would not prevent, under proper circumstances, the courts of another state from entertaining jurisdiction of an asset based thereon.

In this case, however, there is more than the mere accidental, physical location of the policies of insurance in the state of Connecticut and absence thereof from the state wherein this suit is pending. Their presence in the former state has been accompanied by such circumstances both preceding and following the death of the intestate as, in my judgment, require that the courts of the former state should and of this state should not entertain jurisdiction for the collection of them as assets.

Several years before his death, as hereinbefore stated, the intestate had absolutely transferred the title and possession to and of said policies from himself to the defendant, which continued to hold them at the time of his death. I have assumed that although the instruments of transfer were absolute in their terms, that as a matter of fact they were made as security for the repayment of loans then made by the defendant to the intestate. But upon this assumption, the fact remains that the defendant had acquired an absolute title to and possession thereof, which could only be divested by redemption through repayment of the loans. It had acquired, not a mere order upon the funds which might some time become due upon said policies for a certain part thereof, but it had acquired as pledgee a control and possession of the entire interest under the policies which it might enforce in any way it saw fit under

the ordinary rules applicable to such pledges, and until he made repayment and redemption the intestate had no right to the possession or control of said policies. This plaintiff, as administratrix, had no better or greater rights than he had at the time of his death. At the time this suit was commenced, neither she nor anybody else had made the repayments necessary in behalf of the estate of said intestate to redeem and acquire the possession and control of said policies, and I doubt if she was entitled to maintain this suit, independent of the rights of the other administrator. I do not think that this reasoning in this form of action is affected by the fact that the same corporation which held the policies under pledge was the one which had issued them. It is quite possible that plaintiff, if otherwise entitled so to do, might have brought an equity action in which to adjust the various rights of the parties, and that therein the court might have taken care of and adjusted the rights of defendant as pledgee by the proper modification and reduction of its obligations as debtor. But this is not an equity action. It is purely an action at law to establish the legal liability of the defendant upon obligations, which at the time of the commencement of the suit were properly in its possession, and control and qualified ownership, and to which plaintiff was not entitled.

If, however, I am wrong in this construction of the rights as between defendant and plaintiff merely, it seems to me quite clear that this court should not give this plaintiff the collection and possession of said assets as against the Connecticut administrator. Without knowledge that this plaintiff had commenced this suit or even claimed said policies or their proceeds as against him, he performed in behalf of the intestate's estate what the law certainly authorized if it did not absolutely require. He advanced the moneys with which to redeem said policies. He had been legally appointed administrator and when he tendered to defendant the amounts due upon said policies there was nothing for it to do but surrender them to him, and so likewise when, having acquired possession of said policies, he demanded payment thereof, he was entitled to the same as against any other representative of the estate, if the defendant was liable. While he may not, in any legal form, have become subrogated to the benefits for the purposes of administration of superior rights, which defendant had in said policies as pledgee, certainly equitably he should be given the benefit of such subrogation for the purpose of allowing him to collect the policies whereon he has advanced a considerable sum of money. Whether as a matter

of absolute right or as a mere matter of comity between states, it seems that this court should not entertain jurisdiction as against the courts of Connecticut. Merrill v. New England Ins. Co., 103 Mass. 245; Sulz v. Mutual R. F. L. Assn., *supra*, 572. In accordance with these facts, findings and judgment may be prepared dismissing plaintiff's complaint, with costs.

Complaint dismissed, with costs.

JOSEPH B. SWAN, Plaintiff, *v.* THE MUTUAL RESERVE FUND LIFE ASSOCIATION, Defendant.

(Supreme Court, Onondaga Special Term, January, 1898.)

1. **Demurrer — Unauthorized interlocutory judgment — Waiver by appeal.**

   Where an interlocutory judgment, overruling a demurrer to a complaint, is reversed, on appeal, with leave to the plaintiff to amend upon payment of costs, the defendant is not authorized to enter an interlocutory judgment providing that, upon the failure of the plaintiff to amend within twenty days, the defendant should, without application to the court, have final judgment dismissing the amended complaint with costs, nor has he any right thereafter to enter of his own motion such a judgment, upon such a failure to amend in time; but where the plaintiff, instead of moving to correct the interlocutory judgment, appeals therefrom to the Court of Appeals, his action waives the defect.

2. **Same — Stay by appeal to the Court of Appeals — Undertaking — Vacation of interlocutory judgment.**

   Where, however, the plaintiff gives an undertaking upon the appeal to the Court of Appeals, which complies with Code of Civil Procedure, section 1326, proceedings under the interlocutory judgment are stayed; and as its existence may embarrass the plaintiff in that court, the Supreme Court will, as a matter of discretion, vacate it.

MOTION to set aside final judgment, entered in favor of defendant upon an interlocutory judgment sustaining its demurrer to plaintiff's complaint, and for a stay of proceedings on and under said interlocutory judgment until after the determination of an appeal from the same to the Court of Appeals.

William Kernan, for motion.

W. T. B. Milliken, opposed.

HISCOCK, J. In this action the defendant demurred to plaintiff's complaint. Interlocutory judgment was entered upon the decision of the Special Term, overruling the demurrer with costs, and with leave to the defendant to answer.

Defendant appealed from such interlocutory judgment to the Appellate Division where a decision was rendered and order made "that the interlocutory judgment and order so appealed from be, and the same are hereby reversed, with costs and demurrer sustained with costs, with leave to the plaintiff to amend his complaint upon payment of costs of the demurrer and of his appeal." Subsequently and on or about August 30, 1897, the defendant entered an interlocutory judgment upon said order and decision, substantially complying therewith as far as they went, but adding the following: "Adjudged, that upon the failure of the plaintiff so to amend his amended complaint and pay the said costs within the said twenty days as aforesaid, that final judgment be entered forthwith in favor of the defendant, dismissing the amended complaint of the plaintiff herein with costs."

Without dwelling upon an intermediate attempt which the plaintiff made to appeal from said interlocutory judgment to the Court of Appeals, pursuant to an order made by the Appellate Division on or about October 13, 1897, allowing such appeal and certifying certain questions to be reviewed thereon, the plaintiff on or about October 25, 1897, took an appeal from the interlocutory judgment entered upon the decision and order of the Appellate Division, as above mentioned to the Court of Appeals, which is now pending. Upon such appeal he gave an undertaking which is described in the moving papers as the one "required by law upon such appeal."

After said appeal had so been taken and on or about November 30, 1897, defendant, without application to the court, entered and served a copy of a final judgment with notice of entry thereof purporting to be entered upon the interlocutory judgment heretofore mentioned, dismissing plaintiff's complaint, plaintiff not having served the amended complaint provided for in said interlocutory judgment.

Plaintiff insists that he will be prejudiced upon the argument in the Court of Appeals of his appeal allowed by the Appellate Divi-

sion from the interlocutory judgment entered upon its decision by the existence of the final judgment entered upon said interlocutory judgment, and that said final judgment should be set aside; first, because it is irregular in that it does not conform with the original decision of the Appellate Division, and was made without any application to the court; secondly, because the appeal from the interlocutory judgment, with the giving of an undertaking, operated as a stay thereunder, and prevented the entry of said final judgment; thirdly, if for no other reason, as a matter of discretion under all of the facts set forth in the moving papers.

I do not think that the final judgment entered was authorized without application by the terms of the original decision and order of the Appellate Division, which did not provide for or direct the form of any final judgment to be entered. The interlocutory judgment, however, which was entered upon said decision and order, did provide for the entry of such a final judgment, and makes its entry irregular without application to the court. Code, §§ 1021, 1222; Hecla, etc., Mining Co. v. O'Neill, 23 Civ. Pro. 143.

If this interlocutory judgment was in this respect too broad or unauthorized, it should have been corrected upon motion, and the plaintiff having not only failed to make such motion, but having recognized and ratified the regularity thereof by his appeal and other proceedings set forth in the moving papers, has not the right to raise this question at this time.

The affidavits, as above indicated, are somewhat meager and indefinite as to the form of the undertaking given by plaintiff upon his appeal to the Court of Appeals from the interlocutory judgment, but I assume that it is in accordance with the provisions of the Code, section 1326. This being so it would operate as a stay of proceedings under said interlocutory judgment, except in the cases provided by sections 1327, etc., of which this is not one. Defendant's answer to this contention, however, is that under the terms of the interlocutory judgment entered, plaintiff had become in default before the authorized appeal was taken and undertaking given, and that, therefore, by virtue of such default, final judgment could be entered after the appeal and undertaking. I do not think this is so. While plaintiff may have so gotten in default before the appeal was taken that he could not have served an amended pleading under the terms of the interlocutory judgment, I think, on the other hand, that defendant, by the taking of said steps, was stayed from thereafter taking any proceedings under his interlocutory judgment.

Even if I am wrong upon this subject, I think, as a matter of discretion, the final judgment should be vacated. The Appellate Division upon argument and full consideration of the matter has deemed it worth while and proper to allow an appeal to the Court of Appeals. Such being the fact, it does not seem necessary or best to run the risk even of embarrassing such appeal by the entry of said final judgment. Its entry has been delayed for several months when, upon defendant's theory, it could have been entered, and I cannot see that any harm will result from delaying such entry a short time longer.

The motion, therefore, to vacate said judgment and stay further entry thereof is granted, with leave to the defendant, however, if a proper undertaking has not been executed sufficient and suitable to stay proceedings under said interlocutory judgment, to apply for an order requiring the execution of such a one.

Ordered accordingly.

In the Matter of the Application of REBECCA HATTERSLEY, Landlord, Respondent, *v.* MARGARET CRONYN, Who is Proceeded Against by the Name of JANE DOE, Tenant, Appellant.

(County Court, Albany County, January, 1898.)

Summary proceedings — The City Court of Albany has no jurisdiction to try an equitable title asserted by the landlord.

A judge of the City Court of Albany, a court of limited jurisdiction, has no power, in summary proceedings, to pass upon anything except the legal title of the landlord; and the admission of evidence tending to show that a deed from the landlord to the occupant, and under which she claimed possession, was not delivered as an absolute conveyance, but that the landlord verbally reserved the use and occupation during life, is erroneous, as the provisions of Code of Civil Procedure, section 2224, permit the tenant alone to interpose an equitable defense in summary proceedings.

APPEAL from a final order in summary proceedings made by a justice of the City Court of Albany in favor of petitioner.

William F. Beutler, for appellant.

H. D. Alexander, for respondent.

GREGORY, J. This is an appeal from a final order made by Thomas A. Meegan, a justice of the City Court of Albany, awarding the possession of a portion of the premises, known as No. 124 First street, in the city of Albany, to the petitioner, and directing a warrant to issue thereupon.

The petitioner in this matter alleged ownership of the property, and that Margaret Cronyn had intruded and squatted thereupon without her permission or consent. The answer of the defendant to the petition first denied each and every allegation contained and set forth in the petition, except that a copy of the notice to vacate had been served upon her. For a further and separate answer, the defendant alleged that she was entitled to the lawful possession of said premises as a tenant of Sarah Hattersley, whom she claimed was the owner thereof.

The petitioner, to establish her case, offered in evidence a deed from Daniel Coonley and wife to said petitioner, recorded on the 25th day of November, 1862, in the clerk's office of Albany county, and it was shown that the deed described the premises in dispute; and further, that the defendant did not have permission to enter upon the premises, or have possession thereof. The petitioner then rested.

The defendant then offered in evidence a deed of conveyance from Rebecca Hattersley to Sarah Hattersley of the premises in question, dated July 9, 1891, and recorded January 4, 1896. She also testified that she leased the said premises from said Sarah Hattersley, and was in possession thereof under said lease.

There is no dispute but that this deed, from Rebecca Hattersley to Sarah Hattersley, was, in fact, executed by the petitioner, and duly acknowledged in conformity with the law; and that the same was delivered to said Sarah Hattersley. It further appears upon the face of said deed that there is no reservation whatever inuring to the benefit of said petitioner, so that from the record of conveyance, as established upon the trial of this action, the legal and record title to the premises was shown to be in said Sarah Hattersley. Evidence, however, was received in behalf of the petitioner which tended to show that it was not the intention of the said petitioner that the delivery of the deed to said Sarah Hattersley was to be absolute, but that there was, in fact, at the time of the delivery of said deed, a verbal reservation made by the petitioner, wherein and whereby she was to have the use, and occupation and benefit of said property during her lifetime. This was disputed on the part of

the defendant. After hearing the testimony, the justice made the final order above referred to.

The question which is to be decided upon this appeal is, as to whether the judge of the City Court, who tried this case, had the power to pass upon the equities that existed between Rebecca Hattersley and Sarah Hattersley, or whether he was authorized, in deciding the case, to pass upon the legal title only.

This question has been considered by the courts of this state upon several occasions. In the case of Rodgers v. Earl, 5 Misc. Rep. 164, Judge McAdam, who wrote the opinion, and who is recognized as high authority upon questions of this character, referring to the authority of courts of limited jurisdiction in summary proceedings, uses this language: "But the defendant contends that all this has been changed by the amendment to section 2244 of the Code, passed in 1893, whereby a tenant is authorized to plead to a summary proceeding any defense, legal or equitable. True, the amendment does so provide, and if the plaintiffs can obtain all the relief they require by means of such a defense, they require no aid from a court of equity. But the amendment serves no such purpose. The power conferred must be considered with reference to the limited jurisdiction to which it is attached, and so construed it affects the procedure only, by enlarging the number of defenses which a tenant may interpose to protect his possession. It confers no equity jurisdiction upon the courts enumerated."

In Crawford v. Kastner, 26 Hun, 440, the court says: "District Courts are courts of limited jurisdiction. When a justice presides in a summary proceeding provided by statute his powers are limited and restricted; equitable defenses are not available. The justice is not vested with any power in equity and can only investigate defenses of a purely legal character."

In Terrett v. Cowenhoven, 11 Hun, 320, the court held as follows: "But the title of the defendant mentioned was a legal, not an equitable, title. The county judge had no jurisdiction to decide, nor did he decide, upon the legal effect of the facts on which the equitable title of the defendant depends. Those facts were not before him." This case was affirmed in the Court of Appeals (79 N. Y. 400), but the court did not pass upon the precise question which is involved here.

In People ex rel. Ainslee v. Howlett, 13 Hun, 138, this language is used, "In one respect, and in one only, the case of Roach v. Cosine may be considered to have been overruled; that is, in

reference to proving by parol at law, that an absolute deed was intended only as a mortgage, for it was subsequently held by the Court of Errors, in Webb v. Rice, 6 Hill, 219, that parol evidence is not admissible in a court of law to show that a deed absolute in form was intended as a mortgage, and it may be doubtful, therefore, whether in these summary proceedings parol evidence could be resorted to for that purpose. Since the Code, it is held, that inasmuch as it provides that the defendant may set up any defense in an action, whether such defense was theretofore a legal or equitable defense, that the same rule of evidence that prevails in equity, in regard to showing that a deed absolute in form was intended as a mortgage, also prevails in regard to such defenses. But these summary proceedings under the Landlord and Tenant Act, are expressly exempted from the operation of the Code of Procedure, by section 471. It may be doubtful, therefore, to say the least, whether, in the summary proceedings, parol evidence can now be given to turn an absolute deed into a mortgage." See, also, Brown v. Betts, 13 Wend. 29-32.

It will be seen that the trend of these decisions is to the effect that in proceedings of this character, before a court of limited jurisdiction, the court in passing upon the question of title is limited in deciding in whom the legal title is vested, and that such a court is not invested with authority to pass upon such equities as may exist between the parties to a conveyance which is absolute upon its face. If, as claimed by the petitioner in these proceedings, the delivery of this deed to her daughter Sarah was conditional, and it was the intent and agreement of the parties (of the grantor and grantee), that the said Rebecca should have the benefit of the property during her lifetime, the grantor would have ample remedy in an action in a court of equity for the reformation of the deed. But to hold in a summary proceeding against a tenant who was in possession under a lease from one who had the legal title to the premises, that a grantor who had made a conveyance absolute upon its face could have adjudicated the terms upon which delivery of the deed was made seems to be far and beyond what the legislature intended to confer upon a court of limited jurisdiction, as the City Court of Albany.

An examination of the sections of the Code relating to summary proceedings will disclose that there is no authority therein contained which authorizes a petitioner who seeks to regain the possession of real property, to base his proceeding upon an equitable claim

or title. This being a statutory proceeding, the authority of the court to act must be found in the statute which authorizes the proceeding, and no relief or jurisdiction can be inferred. This is an elementary principle and does not need the citation of authorities. However, on reading section 2244 of the Code of Civil Procedure we find, that it is the tenant who is the only one who can set up an equitable defense. The section in terms refers to the answer of the tenant as the only pleading which can set up a statement of any new matter, constituting a legal or equitable defense, or counterclaim. This right is not given to the landlord, or petitioner.

I think that the judge of the City Court erred in receiving the evidence of the petitioner, which sought to establish the equitable claim which she insisted upon, as giving her the right to the possession of the property in question, and that he had merely the right to try the question as to who was the legal owner of the premises.

The judgment appealed from is reversed, with costs in favor of the appellant.

Judgment reversed, with costs, in favor of appellant.

CHARLES ANDREWS, Plaintiff, *v.* JOHN P. MASTIN, Defendant, In the Matter of the Application for an Order Declaring JOHN P. MASTIN in Contempt of Court.

(County Court, Onondaga County, January, 1898.)

Municipal Court of Syracuse — A judgment for less than $25 is not a lien on land — Supplementary proceedings.

The provisions of section 16 of chapter 342 of the Laws of 1892, the act establishing the Municipal Court of the city of Syracuse, declaring that a judgment rendered in that court shall be subject to all the provisions of the Code of Civil Procedure, and further stating that it "shall be a lien and remain in force for the same length of time as a judgment originally recovered in the County Court," have merely the effect of extending, by the language of this latter clause, the duration of the lien of such a judgment but do not make it, when less than $25, exclusive of costs, a lien upon land; and consequently such a judgment cannot be made the basis of an order in supplementary proceed-

ings, nor is the judgment debtor punishable, as for a contempt, in refusing to appear before a referee appointed by such an order.

APPLICATION to punish the judgment debtor, John P. Mastin, for an alleged contempt in refusing to appear before a referee and submit to an examination in supplementary proceedings.

Charles W. Andrews, for judgment creditor.

J. A. Kippley, for judgment debtor.

Ross, J. The plaintiff heretofore recovered a judgment against the defendant in the Municipal Court of the city of Syracuse of $24.50 damages and $5.20 costs.

It is claimed by the judgment debtor that the judgment not being for $25 exclusive of costs that the judge granting the order for examination in supplementary proceedings had no authority to grant the same, and that it is void.

It is conceded by all the parties that unless the judgment in question became upon the filing of a transcript of the same in the Onondaga county clerk's office a lien upon the real estate of the judgment debtor that his contention is correct. For in that event it is conceded that no execution against the property of the judgment debtor within the meaning of section 2436 of the Code of Civil Procedure had been issued. Dix v. Briggs, 9 Paige, 595; Mason v. Hackett, 35 Hun, 238; Importers & T. N. B. v. Quackenbush, 143 N. Y. 567.

It is contended by the judgment creditor that the provisions of chapter 342 of the Laws of 1892, establishing a Municipal Court in the city of Syracuse, make this judgment a lien upon real estate. Section 16 of said act, which is relied upon by the attorneys for the judgment creditor, is as follows:

"A judgment of said court shall be, in all respects, the same as a judgment rendered by a justice of the peace of towns, and all provisions of the Code of Civil Procedure in relation to filing transcripts of such judgments, and docketing the same, in the office of the clerk of Onondaga county, or of any other county, and the effect of such judgment, when so docketed, shall, in all respects, be the same as if said judgment was recovered before a justice of the peace of a town. *But such judgment shall be a lien and remain in force for the same length of time as a judgment originally recovered in the County Court.*."

The provisions of this section, except the last two lines, place a judgment of the Municipal Court of the city of Syracuse upon the same footing as a similar judgment recovered in Justice's Court. The provision, "*But such judgment shall be a lien and remain in force for the same length of time as a judgment originally recovered in the County Court,*" was intended to avoid the rule laid down, or at the time of the passage of the act in question supposed to have been laid down in the case of Dieffenbach v. Roch, 112 N. Y. 621, relative to the effect of the Statute of Limitations upon justice judgments. "*Shall be a lien and remain in force*" are to be read in connection with the words "*same length of time.*" In other words, it was intended to give to a Municipal Court judgment upon the filing of a transcript the same period of existence as a judgment originally recovered in County Court and for such length of time "*it shall remain in force*" and "*be a lien,*" but its language does not give any additional force or effect to the lien, except to extend the time of its duration.

The judgment not being a lien upon the real property of the judgment debtor, the judge granting the same had no jurisdiction, and the order is void. Motion for contempt is denied, with $10 costs.

Motion denied, with $10 costs.

In the Matter of the Contest of THE TOWN OF ONONDAGA *v.* THE CITY OF SYRACUSE, as to the Settlement of MICHAEL AUGUSTINE, a Poor Person.

(County Court, Onondaga County, January, 1898.)

Poor person — Settlement — Effect of Laws 1897, chapter 203.

The provisions of chapter 203 of the Laws of 1897, which took effect on April 7, 1897, and enacted that "A person who has gained a settlement in a town or city loses the same by a continuous residence elsewhere for one year," were intended by the legislature to fix the status of a person who had, for one year prior to April 7, 1897, continuously resided in a place other than that where he had gained a settlement; and hence, a poor person who, prior to 1891, had a settlement in the town of Onondaga, and who, in that year, removed to the city of Syracuse, where he subsequently resided until September, 1897,

although still supported by the town of Onondaga, can, since the passage of the statute, no longer be made a charge upon the town of Onondaga, but must be supported by the city of Syracuse.

APPEAL from a decision of Smith Rice, superintendent of the poor of Onondaga county, in the above matter, in which he determined that the poor person, Michael Augustine, had lost his settlement in the town of Onondaga, and had gained a settlement in the city of Syracuse. The facts are simple. Prior to 1891 Michael Augustine had resided in and obtained a settlement in the town of Onondaga and received aid from that town. In July, 1891, the poor person removed to the city of Syracuse, where he has since resided, and has continued to be a public charge upon the town of Onondaga until September, 1897. In November, 1897, the overseer of the poor of the town of Onondaga served a notice upon the overseer of the poor of the city of Syracuse, notifying the latter that the town of Onondaga refused longer to support the poor person. Thereupon the overseer of the poor of the city of Syracuse served notice of contest and subsequently the decision in question was rendered.

Brown & Manchester, for town of Onondaga.

W. J. & S. E. McClusky, for city of Syracuse.

Ross, J. Under the poor laws, as they existed prior to the enactment of chapter 225, Laws of 1896, the settlement of the poor person in this case was in the town of Onondaga. See R. S., pt. 1, chap. 20, tit. 1.

Chapter 225, Laws of 1896, which at once repealed the existing provisions of the Revised Statutes and provided a comprehensive system of poor laws, did not substantially change the law relative to obtaining or losing a settlement.

A labored comparison of the provisions of those acts is unnecessary.

Prior to April 7, 1897, the poor person in this case was properly chargeable to the town of Onondaga.

Chapter 203, Laws of 1897, which took effect April 7, 1897, provides as follows:

"A person who has gained a settlement in a town or city loses the same by a continuous residence elsewhere for one year."

The poor person having lived continuously elsewhere than the town of Onondaga for over a year prior to April 7, 1897, and also for a like period continuously in the city of Syracuse; if the provision of chapter 203, Laws of 1897, apply to the conditions as they existed at the time of the passage of that act nothing more need be said as to the liability of the town of Onondaga. In other words, the act of 1897 makes a most radical change in the law as it existed relative to the continuance of a settlement of a poor person.

Under the former law a poor person did not lose his settlement until he had lived in the new town one year without help, which offered a premium to zealous officials to suggest help, at least not to discourage an applicant for assistance, which their town did not pay, and which prevented the applicant from becoming a charge upon the new town.

Under the act of 1897, granting assistance does not prevent the loss of a settlement.

Under the provisions of the Poor Law, prior to chapter 203, Laws of 1897, the poor person had frequently removed to some distance from the town, which was compelled to render him assistance, so that the town officials of the town that had to pay could neither determine the need of assistance, or see to it that it was wisely expended.

Hon. T. E. Hancock, attorney-general of this state, has given his opinion that the provisions of chapter 203, Laws of 1897, applied to the conditions as they existed at the time of its passage.

I quote from letter bearing date June 19, 1897, Attorney-General T. E. Hancock to Hon. J. B. Booth:

"In reply permit me to say that chapter 203, Laws of 1897, became a law and went into effect on April 7, 1897, and provides as follows: 'A person who has gained a settlement in a town or city loses the same by a continuous residence elsewhere for one year.'

"In my judgment the intention of the statute is to determine each case under the conditions existing at the time of the passage of the act. A pauper who had resided in a town for one year prior to the passage of this law, it seems to me, becomes a charge upon the town in which he has resided; and it was not intended that the year's residence should be reckoned as a year from the time of the passage of this law, or in other words, from the 7th day of April, 1897."

The effect of the provision of chapter 203, Laws of 1897, relieved the town of Onondaga; has the poor person a settlement in the city of Syracuse?

The settlement in the town of Onondaga was a legal fiction. For reasons which are unnecessary to enlarge upon, the fiction of an actual residence was indulged in. That fiction is now removed and we have the plain physical facts left, that is, where physically and actually has the man lived for the past year, that is the test and the only one.

When the invisible thread that bound this man to a town in which he had not actually resided for over five years was cut, all other restraints which prevented him from being an actual and a legal resident of one and the same place were severed, and his actual, and his legal residence immediately became one and the same. It is as if he had never seen the town of Onondaga, never received help from that town.

His residence in the town of Onondaga for five years was an imaginary one constructed upon statutes, those statutes have been superseded and now all parties concerned must adjust themselves to the actual facts, which show a residence of many years in the city of Syracuse.

"There is no constitutional objection to a general law which alters the rules of settlement, although its effect may be to transfer from one town to another the obligation to support individuals who may become entitled to relief as paupers." Bridgewater v. Plymouth, 97 Mass. 382, 390.

It is only necessary to determine that the town of Onondaga is relieved from the provisions of chapter 203, Laws of 1897, but the facts are all before me; and the superintendent of the poor of the county of Onondaga, and the overseer of the poor of the city of Syracuse, both desire a speedy decision. I think it due these officials that the important question of the present settlement of the poor person be determined, that the interests watched over by them respectively may be protected by such steps as to them seem proper.

The welfare of those unfortunates who may require assistance who are similarly situated also require an early decision.

I appreciate the responsibility of determining the effect of the provisions of chapter 203, Laws of 1897, without precedents to guide, or an opportunity to have any errors I may commit corrected by an appellate court. I am glad, however, to know that the same legislative power which passed chapter 203, Laws of 1897,

can modify or repeal the same if its provisions are found to be unsatisfactory.

The decision of the superintendent of the poor of the county of Onondaga that the said Michael Augustine has lost his settlement as a poor person in the town of Onondaga, and that he has gained a settlement as a poor person in the city of Syracuse is affirmed, together with costs of this appeal to the town of Onondaga, to be taxed.

Decision of the superintendent of the poor affirmed, with costs of this appeal.

ANN McMANUS, Plaintiff, *v.* THE WESTERN ASSURANCE CO., Defendant.

(Supreme Court, Kings Special Term, January, 1898.)

1. **Fire insurance — Pleading performance — Certificate of magistrate.**

In order to recover upon a policy of fire insurance, the plaintiff must plead and prove compliance with all those conditions of the policy which are, by its terms, precedent to a recovery, and this may properly be done by means of a general allegation that the plaintiff has "duly performed all the conditions upon her part;" but a condition that the insured, "if required," shall furnish the certificate of the disinterested magistrate or notary "living nearest the place of fire" that he has examined the matter and believes the loss an honest one is not a condition precedent.

2. **Same — General denial.**

A general denial puts in issue all the allegations of the complaint relative to a compliance with conditions precedent to a recovery.

3. **Same — Affidavit to proofs of loss — Omission of venue — Waiver by new requirements.**

Where an affidavit, made under a requirement of a policy insuring the holder of the policy and "any member of the household" that proofs of loss shall be "signed and sworn to" by the insured, contains no venue, it is fatally defective, but the defect is waived where the insurer, in its objections made to the proof of loss, notifies the insured that it will require, as a condition precedent to payment, that each member of the household who lost property shall verify that schedule which shows the property lost by the member, as such a demand sets up an unauthorized requirement and dispenses with compliance with the one stated in the policy.

4. **Same — Arbitrator not disinterested — Abandonment of appraisal by lapse of time.**

The insured is not bound to participate in an arbitration, provided for by the policy, where she claims that the arbitrator appointed by the insurer is, for reasons stated by the insured, not disinterested; and where, after such objection made, the insurer, although established in the same city, takes no action in the matter for twenty-one days, the questions whether the arbitrator was disinterested and whether the insurer should not, by lapse of a reasonable time, be deemed to have abandonded the arbitration, are properly submitted to the jury.

5. **Same — Right of insured to sue as trustee for "members of the household."**

Semble, that the insured under a policy, insuring other "members of the household," may properly sue alone for the whole loss, as she may be deemed a trustee for the others.

6. **Same — Insurer cannot exact additional requirements.**

An insurer cannot after a loss has occurred establish a new requirement, not contained in the policy, that the proofs of loss shall show the cost of articles totally destroyed.

ACTION to recover on a policy of fire insurance. Motion on the minutes to set aside a verdict for plaintiff and for a new trial.

The complaint alleges the insurance of the plaintiff by the defendant by its policy issued to her to the extent of $5,000 on household furniture and other personal property; its destruction and damage by fire to a greater amount than the said sum on March 29, 1896; that on April 9, 1896, the plaintiff duly served proofs of loss on the defendant; and then generally, "that she has complied with all the other conditions of the said policy on her part."

The answer is a general denial only.

The policy in so many words insures the plaintiff "on household furniture", including many enumerated heads or classes, "the property of the assured, or any member of the household, while contained in the" dwelling described, in the city of New York.

The policy provides that if fire occur the insured "shall give immediate notice of any loss thereby in writing to this company", and also within sixty days after the fire "shall render a statement to this company, signed and sworn to by said insured", stating

among other things "the interest of the insured and of all other persons in the property; the cash value of each item thereof and the amount of loss thereon"; and also, "if required", furnish a certificate of the disinterested magistrate or notary "living nearest the place of fire", stating that he has examined the circumstances, and believes the insured has honestly sustained loss to an amount which he is to state therein.

The proofs of loss (served April 9, 1896) embrace complete lists of the articles damaged, their "sound value" being set down in a column under that head, and the "damages claimed" being set down in a second column so headed; and also of the articles destroyed, with their "sound value" set down under that head. No other figures are given therein. The household consisted of the insured and her husband, and their four adult children, two sons and two daughters, and the said lists were divided into schedules showing the articles belonging to each member of the household. All of them signed the certificate at the end of such complete inventory to the correctness thereof. Prefixed to such inventory is the general statement of the insured required by the policy. It refers to the inventory as showing the property damaged or destroyed and the amount of the loss. It is signed by the insured, and under her signature follows the following certificate of oath, not signed by her, and without venue, viz.:

"Personally appeared, Mrs. Ann McManus, signer of the foregoing statement who made solemn oath of the truth of the same.

Witness my hand and official seal this eighth day of April, 1896.

MICHAEL A. BURDETT
(134) Notary Public, N. Y. Co."

By letter of the company to the insured and her agents (adjusters) dated April 18, it notified the insured that "the papers offered as proofs of loss are defective", and "to serve new papers in proper form as follows", five objections being then enumerated, viz.:

"First: The statement prefixed to the schedules is not properly verified. There seems to be no venue and no affidavits signed by the insured, but merely a certificate of the notary, that the insured 'made oath to the truth of the same'."

The second objection was, substantially, that there was no statement of who were the persons claiming as members of the household, under that clause of the policy, nor as to the specific property claimed by each, nor as to their relationship to the in-

sured; the third was that there was "no statement as to the place of residence of the notary who certifies to the loss", and it is insisted "that the residence shall be stated, and also the fact that he is the notary 'living nearest' to the fire"; the fourth was that the schedules are not "verified", but merely have a certificate purporting to be signed by various persons. "We require that each schedule shall be duly verified by the person claiming to own the property. It must be sworn to be correct and to be his or her property"; and the fifth was, "The schedules do not show the cost of each article as required by the policy."

The plaintiff's agents responded by letter dated April 22, saying, "we fail to discover any errors or omissions." To the first objection (that to the oath) they only say, "we refer you to the above mentioned proof of loss." To the second, they give the names and relationship of the members of the household, and point out that the schedules show the property of each; to the third they give the address of the notary, and say he was the one living nearest to the fire; to the fourth they point out that all the members of the household signed the certificate to the correctness of the schedules; and to the fifth they say the assured were unable to "positively state the exact cost of every article." The company responded by letter of April 30, insisting upon the objections made, and that the proofs of loss should be corrected to conform to them, and adding that "we shall stand upon our legal rights and reject the proofs already offered. You have ample time to file proper proofs and on our part we insist that you do so." The plaintiff's attorneys wrote the company on April 24, saying only that its letter of objections of April 18 had been referred to them, and that they would communicate in reference to it in a few days. On May 4 they simply wrote, "We trust that you will be advised to deal with the assured on a just and equitable basis without insistence upon purely technical and non-meritorious objections." The company answered on May 5 that this characterization of the objections "does not deprive them of their full force or us of the right to insist upon compliance", and stated that efforts of the attorneys to procure "prompt action" with regard to them "will facilitate the settlement of your claim and will be appreciated by us." About May 11 plaintiff's agents filed with the company an affidavit by the notary (Michael A. Burdett) who made the certificate of oath of the insured to the proofs of loss, stating in substance that he was a notary public of the state of New York, re-

siding in the city of New York, and that on April 8 (the date mentioned in the said certificate) Mrs. Ann McManus, personally known to him as having made the proofs of loss, personally appeared before him, and subscribed the said proofs, "and was sworn before the said Michael A. Burdett on the 8th day of April, 1896, in the city and county of New York." By letter to the plaintiff's attorney, dated May 11, the company acknowledges receipt of this affidavit, and says: "Detached statements in letters and papers do not supply the omission. We have no 'proofs signed and sworn to by the insured'. You claim that the insured are Ann McManus, Mary A. J. McManus, Hannah McManus, Thomas McManus, Sr., Thomas W. McManus and Nicholas P. McManus, and certain schedules claim that certain property covered by our policy belongs to each. We insist that each one shall swear to the list claimed for him as correct and we demand that the oath shall be administered and certified as required by law, so that an action may be based thereon if found incorrect. We insist that you comply with the requirements of our letter of the 18th of April and, if your claim be just and honest, can see no reason for your attempted evasion." It adds that unless the proofs of loss be "amended and perfected, we shall reject those formerly sent in. In fact we do reject them and give you the opportunity to put in corrected proofs of loss if you desire. Such proofs must be sworn to by each of the insured in proper form as to the loss, value, cost and damage of each item claimed." It also says that the company is willing to go into an "immediate appraisal upon the distinct understanding that such action shall not be construed as any waiver of our rights to proofs of loss, as demanded by us"; and this reservation it repeated in subsequent letters, and kept good. By letter of May 13 plaintiff's attorneys respond that "the proofs of loss as filed are certainly sufficient"; and also: "we regret to say that it seems to us utterly impossible to meet your varying requirements, and having as we believe fully conformed to the requirements of the policy, which is the contract between the company and the insured, we can only express the hope that you may be advised to look at the matter from a different standpoint and pay the loss with that promptness which is characteristic of well established and properly managed companies." By letter of May 14 the company says in response: "We beg to say, however, that we have never made but one set of objections to the proof of loss. We may say that those were

forwarded to Mrs. McManus in care of her adjusters, Messrs. Sonnenfield & Baird. In that letter we stated specifically just what we desired." This reference is to their said letter of April 18. No other corrections of the proofs of loss were made or attempted.

Annexed to the proofs of loss is a certificate by notary Michael A. Burdett of the facts and tenor prescribed by the policy to be certified by the magistrate or notary living nearest the place of fire. He does not certify his residence by street and number, or that he was "living nearest" the place of fire, but only that he was "residing in New York city contiguous to the property" where the fire occurred.

The policy provides that if the insured and the insurer disagree as to the amount of loss, it shall be ascertained by "two competent and disinterested appraisers", one appointed by each, they to submit their differences to an umpire who is to be selected by them before they begin the appraisal, the award in writing of any two of them to determine the amount of loss; and it also provides that "the amount of loss or damage having been thus determined, the sum for which this company is liable pursuant to this policy shall be payable sixty days after due notice, ascertainment, estimate, and satisfactory proof of the loss having been received by this company in accordance with the terms of this policy."

Each party having appointed an appraiser (the insured on May 4, and the insurer on May 14) the insured through her agents objected to the company's appraiser by letter dated May 27, the only reason given being in the general words, "as he is not competent to act under the terms and conditions of your policy." By letter of June 3 the company stated that it was unaware of any reason why he could not act and asked that the objections be specifically stated. By letter of June 8 the agents of the insured stated the objections to be that the person named had acted as appraiser for the insurers "on numerous occasions, as well as for other companies, and is in fact depending on insurance companies exclusively for a livelihood"; and also that he was the "auctioneer, owner and manager" of a named company "that wrecks, assorts and disposes of property damaged by fire and taken by the insurance companies in order that their losses might be reduced thereby, being and in fact is an employee of insurance companies in general." No acknowledgment of or response to this letter having been sent, and nothing being done or proposed by the company, this action was begun on June 29, and no appraisal was had.

Each of the said objections to the proofs of loss made in the said letter of the company of April 18, and of the further objections that the action was prematurely brought before an appraisal, and also before the expiration of the sixty days after proofs of loss and ascertainment of amount of loss prescribed by the policy, and the objection that it did not appear that the certifying notary was the one living nearest the fire, was taken and insisted upon at the trial, in the motion to dismiss at the close of the plaintiff's case, and again at the close of the case, except the one that the relationship to the insured of the members of the household interested did not appear.

The plaintiff's counsel insisted as to each of these objections, that it could not be taken on the trial for not having been pleaded as a defense.

The defendant also moved to dismiss on the ground of variance between the complaint and the proof, in that only part of the property belonged to the plaintiff.

The court sent the case to the jury on the questions of fact whether the company waived the defect of the oath in the proof of loss, whether its appraiser was disinterested, and whether it abandoned the appraisal; also on the question of damages.

Charles Wehle, for plaintiff.

George A. Stearns, for defendant.

GAYNOR, J.: There is a question of pleading. Compliance by the plaintiff with each of the provisions of the policy for the furnishing of proofs of loss, and for the ascertainment of the amount of loss by agreement or by appraisal, was a condition precedent to plaintiff's right of action; and by the terms of the policy the company had sixty days after such compliance within which to pay. It follows that it was for the plaintiff to plead and prove such compliance. Under common law pleading it was necessary for the plaintiff to particularly plead each condition precedent, and compliance therewith, or a good reason or excuse for non-compliance, such as that the defendant waived or prevented compliance (Chit. Pl. 16th Am. Ed., vol. 1, 332-7; Bogardus v. N. Y. Life Ins. Co., 101 N. Y. 328). But under our system of pleading, such particularity is not necessary, a general allegation that the plaintiff "duly performed all the conditions on his part"

sufficing to enable proof to be made of compliance or of excusable non-compliance (Code Civ. Pro., § 533). The complaint has this general allegation. The answer, which is a general denial only, was sufficient to put in issue all that could be proved under the complaint. A general denial is always the scientific and sufficient way to put in issue all that the plaintiff has necessarily pleaded and must prove, though it seems to be growing very much out of mind in the profession. The defendant should never plead as a defense anything which is embraced within the general issue raised by a general denial. A defense can consist only of new matter, viz., matter outside of such general issue (Code Civ. Pro., § 500). If pleaders would bear in mind that the burden of proof is on the defendant to make out a defense, they would be less prone to plead as defenses facts which are not defenses, but within the general issue. Sometimes the courts take them at their word, and throw the burden of proof on them for their so-called defenses, and thus enable the plaintiff to prevail, as in Whitlatch v. The Fidelity Co. (149 N. Y. 45).

But the furnishing of the certificate of the magistrate or notary living nearest the place of the fire, provided for in the policy, was not such a condition precedent. The plaintiff was not obliged to furnish it, unless "required" to by the company. Such is the language of the policy. She therefore did not have to prove the negative that she was not so required; or the affirmative that she was and complied; but it was for the company to plead as a defense the condition precedent to its right to such certificate, viz., that it called for it of the plaintiff, and then that she failed to furnish it. The question of compliance with this provision of the policy being therefore not in issue, no further note is taken of it.

The requirement of the policy that the proofs of loss shall be "signed and sworn to" by the insured means, by general understanding and practice in matters requiring such verification, that the oath, or a certificate thereof, shall be in writing. This present certificate does not state that the affiant made oath before the notary. This defect seems to be fatal to its sufficiency (Proffatt on Notaries, sec. 68; Smart v. Howe, 3 Mich. 590). But the company did not include it among its grounds of objection, and thus excluded and waived it. The only objections specified on the head of the oath were that there was "no venue and no affidavit signed by the insured." There being no requirement in the policy that the insured should sign the affidavit, the latter is untenable (Proffatt, sec. 67; Millius v. Shafer, 3 Denio, 60. But the former was

good, absence of a venue making an affidavit a nullity (Thompson v. Burhans, 61 N. Y. 52; Proffatt, sec. 66). The affidavit of the notary subsequently made and served upon the company did not supply the lack of a validly certified oath by the insured. It was her oath in writing, or a valid certificate thereof, which the company was entitled to. The proofs of loss were thus fatally defective, and the plaintiff may not prevail unless such defect were waived by the company. It now seems to me as matter of law that it was. After stating in its letter of April 18th the said two objections to the certificate of oath, it further stated therein that it required that each schedule should be sworn to by the person claiming to own the property contained in it. This was notice that the oath of the insured would not be accepted as sufficient, but that there must be five oaths, viz., one by each member of the household to the schedule of his or her property; notwithstanding that the policy required the oath of the "insured" only. By the said letter it demanded that the insured "serve new papers in proper form", and prescribed the form, which included the said five oaths. By its letter of May 11th the company again explicitly exacted this. It said: "We insist that each one shall swear to the list claimed for him". It added that it rejected the proofs of loss sent in, and gave opportunity to put in corrected proofs, saying that such proofs must be sworn to "by each of the insured in proper form", meaning by each member of the household. The company thus gave notice that a tender of proofs of loss verified as required by the policy, viz., by the oath of the insured, would not be accepted as sufficient, but that the proofs must be verified by the five members of the household in order to be so accepted. It thereby set at naught and dispensed with the provision of the policy for proofs of loss, and set up a new requirement instead. The rule would seem to be the same here as in the case of obligations to tender performance of contracts generally. If notice be given in advance that the tender, whether of money or of other performance, will not be accepted, it need not be made (Crist v. Armour, 34 Barb. 378; Burtis v. Thompson, 42 N. Y. 246; Bunge v. Koop, 48 N. Y. 225; Howard v. Daly, 61 N. Y. 362; Baumann v. Pinckney, 118 N. Y. 604). It always excuses the performance of a condition precedent if it be hindered or waived by the other party (Langdon v. Burrill, 21 Vt. 466). One who declares to the other party to a contract his intention not to abide by it commits thereby a breach upon which action may be brought at once (Bishop on Contracts, sec. 1428). And in insur-

ance law, a denial by the insurer of liability in any event, is held to operate as a waiver of the provisions requiring notice and proofs of loss, and submission to arbitration (Joyce on Ins., secs. 3257, 3373). A notice in advance that proofs of loss made in a form different to that required by the policy, will be insisted on, and that proofs made in the form required by the policy will be rejected as insufficient, seems to present an equally clear case of waiver.

It is insisted by the defendant that whether the company had delayed so long that it must be deemed to have abandoned the appraisal or arbitration was a question of law for the court, and that it was error to submit it to the jury. Being informed by the insured by letter on June 8th of the specific reason why she objected to the appraiser is had named as not "disinterested", it made no response for twenty-one days, and did nothing in the matter of the loss, though it had its office and transacted its business in the same city where the insured lived and the fire occurred; whereupon this action was brought on June 29th. It seems to me it was not error to submit the question to the jury. To be sure it is often repeated that what is a "reasonable time is, when there is no dispute as to the facts, a question of law for the court" (49 N. Y. 225; 34 N. Y. 553; 67 N. Y. 277). Nevertheless the rule is not generally so understood, especially in the trial of causes, but is every day taken and stated to be, that when the facts are undisputed they present a question for the court, *unless different inferences may be reasonably drawn from them*, in which case the question is for the jury. Moreover, the undisputed fact in this case of the delay of twenty-one days, had to be considered in the light of the society of facts in which it was found. The delays which had already occurred, and the difficulty of preserving any longer the remains and evidences of the goods damaged and destroyed, bore directly upon the question of whether it was an undue delay.

The plaintiff was not obliged to go into an appraisal before an arbitrator appointed by the company who was not disinterested and unbiased, and the evidence on that head presented a question of fact for the jury. Having found against the competency of the arbitrator, the jury then had before it properly the question of the abandonment of the arbitration.

The action seems to be properly brought in the name of the insured alone for the entire loss. The policy in effect recognizes her as taking the insurance not only for herself individually, but as trustee for the members of her household; and this enables her

to recover the entire loss (Stillwell v. Staples, 19 N. Y. 401; Waring v. Indemnity Co., 45 N. Y. 606). At all events, if the rather obscure objection made on this head, in the motion to dismiss for variance, be understood as an objection that all interested should have been joined as plaintiffs (Boynton v. The Ins. Co., 16 Barb. 254; Winne v. Niag. Ins. Co., 91 N. Y. 192), it is unavailable for not having been pleaded in the answer (Code Civ. Pro., secs. 498, 499).

There is no requirement in the policy that the proofs of loss should state the cost price of the articles, and the company had no right to make the objection on that head. The requirement is to state "the cash value of each item thereof, and the amount of loss thereon". The inventory which the insured is required by the policy to make "forthwith" after the fire, "stating the quantity and cost of each article and the amount claimed thereon", is confined by the terms of the policy to damaged articles and does not embrace articles totally destroyed; and there is no requirement that it be made part of the proofs of loss. The motion for a new trial is denied.

Motion denied.

JAMES GREEN, Plaintiff, *v.* ROBERT B. BROWN, Defendant.

(Supreme Court, Kings Special Term, January, 1898.)

1. **Usury — Interest after maturity.**

A note or other contract for the payment of money is not usurious and void for providing for the payment of more than statutory interest after maturity.

2. **Pleading — Denial.**

A denial in an answer is not a "defence," and may not be pleaded as or in a defence. Denials and defences are distinct both in name and substance.

3. **Same — Demurrer.**

Only new matter, namely, matter not embraced within the issue raised by a general or special denial, may be pleaded as a defence; and the fact that in a pleaded defence is found a reiteration of a previous denial, is no reason for refusing to sustain a demurrer to such defence, when the new matter pleaded in it does not constitute a defence. A denial in a defence is mere surplusage, and not to be regarded.

TRIAL of an issue of law in an action upon a promissory note. The complaint alleges the note to have been dated, and made and delivered by the defendant to the plaintiff, at St. Louis, Mo., and by its terms to be payable to the order of the plaintiff one year after date at a named bank in the City of New York, with interest at the rate of six *per cent.* until maturity, and after maturity at the rate of eight *per cent.* The answer pleads as a defence that the note was not made and delivered at St. Louis, but at New York City, and that the agreement to pay eight *per cent.* interest after maturity made the note usurious and void. To this defence the plaintiff demurs that it is insufficient in law upon the face thereof.

Edward F. Dwight, for plaintiff.

Howard A. Sperry, for defendant.

GAYNOR, J.: A note or other contract for the payment of money is not usurious and void for providing for the payment of more than the statutory rate of interest after maturity (Pomeroy v. Ainsworth, 22 Barb. 124; Sumner v. People, 29 N. Y. 337; Bank of Chenango v. Curtiss, 19 Johns. 335).

That there is incorporated in the defence a denial of the allegation of the complaint that the note was given for value, does not prevent the demurrer from being sustained. This denial had already been pleaded in the appropriate place for denials, and should not have been repeated. And a denial is not a "defence". It can have no place in a defence. A denial in a defence is mere surplusage, and is not to be regarded. Not even a novice in pleading should plead a "denial" as a "defence". In an answer "denials" are pleaded, if there be any, and then come "defences." The latter always were, and they still are, distinct from the former in both name and substance. A defence may only contain new matter, viz., matter outside of the issue raised by a general or special denial (Code Civ. Pro., sec. 500). A defendant may set forth as many defences as he has, "whether they are such as were formerly denominated legal or equitable," and each must be separately stated and numbered (sec. 507). This illustrates the confusion of calling a denial a defence, for who in referring to denials would distinguish them in respect of whether they are "legal or equitable"? Nothing should be pleaded "as a defence" the burden of proving which is not upon the defendant.

Courts are liable to take careless pleaders at their word, and throw upon the defendant the burden of proving matters alleged as a defence which is no defence at all, but embraced within the general issue, thereby enabling the plaintiff to prevail, as in *Whitlatch* v. *The Fidelity Co.* (149 N. Y. 45). It has become almost the rule to find contributory negligence pleaded as a defence, although that issue is raised by a denial, and the burden of it is upon the plaintiff. It has even become quite common to find answers which formally plead not only denials, but also admissions under the head of " For a defence ", whereas an admission is neither a denial nor a defence, and does not need to be pleaded at all, for every material allegation not denied stands admitted. I do not overlook that in *Fletcher* v. *Jones* (64 Hun, 274) it was held that a demurrer to a defence of new matter in justification in an action of libel, which was adjudged to be no defence at all, could not be sustained because the previous general denial to the complaint was found to be reiterated in such defence; but I do not conceive that case to be regarded as more than local authority, if it remains even that. A general denial repeated in a defence is no more to be regarded than any other surplusage or idle verbiage found there. The broad meaning which has been given to the word defence in section 3253 of the Code has no application to the rules of pleading. The demurrer is sustained.

Demurrer sustained.

ARTHUR C. JACOBSON and MINNIE L. HUHN, as Executors and Trustees under the Last Will and Testament of MARY JACOBSON, deceased, and ARTHUR C. JACOBSON, individually, Plaintiffs, *v.* THE BROOKLYN ELEVATED RAILROAD COMPANY, THE UNION ELEVATED RAILROAD COMPANY, and FREDERICK UHLMANN, as Receiver of THE BROOKLYN ELEVATED RAILROAD COMPANY, Defendants.

(Supreme Court, Kings Special Term, January, 1898.)

1. Elevated railroads — Improper joinder of causes of action.

In a complaint in equity for an injunction against the continuance and operation of an elevated railroad through a street, unless the damages caused thereby to certain abutting real property be paid, the executors of the deceased owner of the abutting real property, and the present owner by devise from her united as plaintiffs, alleging that

they were the owners of the said property, and asking that all of the damages from the beginning be assessed, and that the company be restrained from continuing and operating the road, unless such damages be paid. Held, that two causes of action, viz., that of the executors and that of the owner were improperly united, but that objection was waived for not having been pleaded.

2. **Same — Jury trial — Waiver.**

Also, held, that the cause of action of the executors shown by the evidence was not equitable, but only a common-law action for damages; but that the defendant did not waive objection to its being tried in equity, and its right to a jury trial, by not pleading that there was an adequate remedy at law, for the reason that such cause of action did not appear by the complaint, which, on the contrary, stated a good equitable cause of action only, against which such plea could not be interposed.

3. **Same — Dismissal of complaint.**

Also, held, that such common-law cause of action having appeared by the evidence, the defendant was entitled to have the complaint as to it dismissed; but having instead asked that it be sent to the jury calendar, that course should be followed.

THIS is an action to restrain the elevated railroad company defendant from maintaining its structure and operating its railroad along the street on which the real property of the plaintiff Jacobson abuts, unless it pay the damage done thereby to such property, the amount of which the court is asked to ascertain and fix herein. The complaint alleges that the plaintiffs own the property. But the proof is that the plaintiff Jacobson owns it by devise from his mother, who died in September, 1896, she having owned it from 1883. Her executors are joined with him as plaintiffs, and the complaint prays that all damages from the beginning, in loss of rents, and also the permanent fee damage, be assessed, and that the company be restrained, as aforesaid, unless it be paid. The road was built, and its operation begun, in 1888. The case was brought on for trial as an equity cause at Special Term.

Stephen M. Hoye, for plaintiffs.

Alex. S. Lyman, for defendants.

GAYNOR, J.: Counsel for the company moved before any witness had been sworn, and again at the close of the evidence, that

the claim for damages for loss of rents which accrued prior to September 12, 1896, when the plaintiff Jacobson got title by devise from his mother, be sent to the jury calendar for trial, and that the court try in equity only the case of the said owner. Upon the death of the said mother her claim for damages passed to her executors. They have no interest in restraining the maintenance and operation of the road. Their claim is disconnected from the land, and is the basis for a common law action for damages only. On the other hand, the mother's devisee (the plaintiff Jacobson) has a separate claim for damages since he became owner, and also a right of action to restrain the future maintenance and operation of the road; but he has a standing in equity to have his damages found and to obtain relief by injunction at the same time (Cogswell v. R. R. Co., 103 N. Y. 10). Two distinct causes of action, viz., that of the present owner and that of the executors of the former owner, are therefore improperly united. But the defendant cannot take this objection for not having pleaded it (Code Civ. Pro., secs. 498, 499). Nor has it pleaded that the executors have an adequate remedy at law. But it was not required to do this, for the complaint does not disclose their true position of having only a legal cause of action, but on the contrary it alleges that they with the other plaintiff (Jacobson) are the owners. It does not disclose that the plaintiff Jacobson became the sole owner in 1896, as devisee of their testator. The complaint thus states a good suit in equity only. In such a case the defendant never had to plead that the plaintiffs, or any of them, had an adequate remedy at law, in order to oust chancery of jurisdiction. On the contrary, when the proof showed that instead there was only a common law action, it was in time to take the objection to the jurisdiction of chancery then, and the suit had to be dismissed (Dalton v. Vanderveer, 31 Abb. N. C. 430; Wheelock v. Lee, 74 N. Y. 495). But that motion has not been made here in respect of the executors, and we therefore have the precise question to decide, viz., whether the action must be severed, and the claim of the executors sent to the jury calendar, for that was the motion made. I think it must be answered in the affirmative. The defendant was entitled to a jury trial thereon, and did not waive it (Wheelock v. Lee, *supra;* Code Civ. Pro., sec. 1009). It did not plead a misjoinder, nor that the executors had an adequate remedy at law, (for that was not true of their cause of action as alleged, and therefore could not be pleaded of it); nor did it move to dismiss their cause of action upon the evidence, which revealed that they had none in equity;

but nevertheless it asked in time for a jury trial. That it did this instead of asking for the dismissal which it was entitled to, can not be found fault with by the plaintiff executors; and I do not dismiss it only because the defendant asks instead that it be sent to the jury calendar.

From the time the road was built to the present, I find that the value of the property has depreciated about $2,000, one-half of which is permanent damage caused by the road. The plaintiff Jacobson has lost $60 in rent. Let the plaintiff Jacobson have judgment for a perpetual injunction unless this sum of $1,060 be paid.

Ordered accordingly.

WILLIAM A. WRIGHT, Plaintiff, *v.* JOHN R. THORPE et al., Defendants.

(Supreme Court, Kings Special Term, January, 1898.)

Fraudulent transfers — An instrument hindering creditors — Nonconsenting creditors.

A trust instrument, made by a judgment debtor when insolvent, by which he transfers all his business and assets to trustees who are to conduct the business for an indefinite time and pay in full, from the proceeds, such creditors as shall come in and agree to the arrangement, and thereupon transfer the business to the debtor, and which further provides that, if the debtor at any time provides a purchaser of the business for a sum sufficient to pay the consenting creditors, the trustees shall transfer the property to the purchaser upon receiving that sum, which shall be divided among the consenting creditors, is a scheme which hinders and delays all creditors who do not consent to it and may be set aside at the instance of a nonconsenting judgment creditor.

ACTION by a judgment creditor to set aside a transfer of property by his debtor as fraudulent and void against creditors. It is by a trust instrument which transfers the business and all of the assets of the debtor therein, to trustees to hold the same, run the business for an indefinite time, and out of the profits pay in full such of the creditors as shall come in and agree to such arrangement, and thereupon to transfer back to the debtor. It also provides that if at any time the said debtor shall provide a purchaser of the said business for a sum sufficient to pay such consent-

ing creditors, the trustees shall transfer to such purchaser upon receiving the said sum, which they shall divide among the said creditors. The property so transferred by the debtor was all that he had, and he was insolvent when he made such transfer.

Clarence J. Shearn, for plaintiff.

Louis Wertheimer, for defendants.

GAYNOR, J.: This scheme hinders and delays all creditors who did not consent to it (of whom plaintiff is one), and is therefore void as to them (Sutherland v. Bradner, 116 N. Y. 410). Judgment for the plaintiff.

Judgment for plaintiff.

ARTILISSA V. GEARON, Plaintiff, *v.* JAMES KEARNEY et al., Defendants.

PAULINE W. SQUIRE, Plaintiff, *v.* JAMES KEARNEY et al., Defendants.

(Supreme Court, Kings Special Term, January, 1898.)

1. **Foreclosure — Equities as between assignees — Bona fide purchasers.**

Where the legal owner of premises, subject to two mortgages, authorizes an attorney to raise money for their payment and the owner thereafter gives a lender, for that purpose, a purchase-money mortgage and the attorney pays the existing mortgages, but, instead of having them satisfied, takes assignments of them to himself which he temporarily withholds from record, his bona fide assignees for value and without notice, other than such as might be derived from the fact that the consideration named in the assignments to him was one dollar, are to be protected in equity against purchasers from him of the purchase-money mortgage, which, upon its payment by him, he had procured to be assigned to himself; and this although he had assured such purchasers that the purchase-money mortgage was a first lien and although the records, at the time of the purchase, did not show the fact to be otherwise.

2. **Same — Fraud of agent of legal owner.**

It is to be considered, upon such a state of facts, that the legal owner of the property has, by his acts, enabled the attorney to gain the possession and apparent ownership of the first mortgages, and

hence bona fide purchasers of them from him are to be protected, even though his purpose in procuring the assignments to be made to himself was fraudulent.

3. Same — Latent equities subsequently created — Estoppel.

The representations of the attorney, made to the purchasers of the purchase-money mortgage and stating that it was a first lien do not estop his bona fide assignees, as bona fide purchasers of a valid security cannot be charged with latent equities which have been created after the inception of the instrument.

4. Same — Bona fide purchasers — Notice.

Assignees of mortgages are not put upon inquiry by a nominal consideration expressed in prior assignments of the mortgages, where inquiry would not have disclosed an alleged priority.

ACTION of foreclosure.

M. Gearon (J. A. McCreery, of counsel), for plaintiff Gearon.

Rush Taggart, for plaintiff Squire.

Miller, Decker & Miller (Jacob F. Miller, of counsel), for defendants Maria S. Dunkin and Ella V. Greene.

HIRSCHBERG, J. Convenience will be subserved by the disposition of these cases together. Each is brought to foreclose a mortgage upon the same premises and in each a defense is interposed by the defendants Dunkin and Greene asserting the prior equity of the same subsequently recorded mortgage. The real estate affected by the three mortgages in question was conveyed to the defendant James Kearney on the 15th of September, 1891, subject to two of the mortgages, viz.: One for $1,800, given to George H. Roberts, January 9, 1884, and one for $1,200, given to Jane J. Davenport, April 24, 1889. At the time of the conveyance to Kearney, these mortgagees were still the owners of the mortgages respectively. The conveyance to Kearney was without consideration, and was effected through an intermediary from the real owner, McCann, and for reasons not disclosed. The papers were drawn by an attorney, William H. Nafis, and at the time of the transaction it was understood that he would secure a new loan on the property of $3,000, and with the proceeds would take up the two mortgages above mentioned. Such a loan was procured by him at that time from one Maria N. Anderson, and

a purchase-money mortgage for $3,000 was executed September 15, 1891, by Kearney to her. The money was paid by Mrs. Anderson to Nafis, and on the 3rd of October following Nafis paid to Roberts the amount of his mortgage, viz.: $1,800, and took from him an assignment of it to Mrs. Anderson, expressing the consideration of one dollar. This assignment was recorded November 13, 1891. Mrs. Anderson knew nothing of the assignment to her of the Roberts mortgage. She in common with the other parties trusted Nafis implicitly, and he was accordingly enabled to manipulate the securities as he pleased.

On April 12, 1893, Nafis paid Mrs. Anderson the full amount of her mortgage, and took from her an assignment to himself, both of the Roberts $1,800 mortgage and her own $3,000 mortgage. The assignment of the Roberts mortgage was for the expressed consideration of one dollar, and she says she signed it because Nafis asked her to do so, and without any understanding or knowledge of what it was. On the 20th of April, 1893, Nafis sold and assigned to the defendants Maria S. Dunkin and Ella V. Greene the $3,000 mortgage for its full face value, assuring them that it was a first lien on the property. The assignments of this mortgage to Nafis and to said defendants were recorded the next day.

On January 12, 1894, Nafis paid to Mrs. Davenport the full amount of her mortgage, $1,200, and took from her an assignment of it to himself dated that day, and expressing a consideration of one dollar. At that time, therefore, Nafis held unrecorded assignments of both the mortgages which were prior of record to that held by the defendants Dunkin and Greene.

On July 3, 1895, Nafis sold the Roberts mortgage to the plaintiff Pauline W. Squire for $1,800, and transferred it by an assignment to her dated that day, and which assignment, together with the assignment of that mortgage to Nafis, was recorded July 16, 1895.

On September 25, 1895, Nafis sold the Davenport mortgage to the plaintiff Artlissa V. Gearon as a $1,000 mortgage, and for that sum. Her husband and attorney, before consummating the purchase, searched the records, and also required and received from Kearney a verified certificate to the effect that the mortgage was a valid and subsisting lien as a second mortgage upon the premises, and that there was no legal or equitable defense to it. Nafis died in the month of October, 1896. On December

22, 1896, the assignments to him and to Mrs. Gearon of the Davenport mortgage were recorded.

The defendants insist that both the prior mortgages were paid in fact by Nafis, and that they were, therefore, dead at the time they were transferred to the plaintiffs respectively; and that if they be considered as then legally revived by Nafis, neither could be negotiated to the injury of the holders of the third mortgage. This contention is based on the assumption that the money used by Nafis in paying Roberts and Mrs. Davenport was money belonging to Kearney, and that the intention of the parties was that these prior mortgages should be paid off and canceled. Assuming that the money used was Kearney's, I think a purchaser in good faith for value would be protected in dealing with Nafis as the owner. The intention is to be gathered from the acts of the parties. It was certainly the act of the legal owner of the property which enabled Nafis to procure the possession of the mortgages and to invest himself with the *indicia* of ownership, and as between himself and a purchaser for value he would be estopped from disputing the validity of the title acquired by Nafis. As has been seen, he did not hesitate to certify under oath that one of the mortgages was a valid incumbrance, and subject to the other one, four years after the money was borrowed which it is claimed was used in paying them off. But even assuming that the intention was to pay off and discharge the prior mortgages, then the act of Nafis in procuring an assignment to himself was fraudulent, but that fact would not prevent him from giving a good title to a *bona fide* purchaser for value. As was said in Simpson v. Del Hoyo, 94 N. Y. 194, "It is a familiar rule of law that a fraudulent purchaser of real and personal property obtains the legal title to the property purchased, and that he may convey a good title to any *bona fide* purchaser from him for value." In that case, it was accordingly held that the holder of a bond and mortgage concededly worthless and uncollectible in his hands could transfer it, and the purchaser for value without knowledge or notice of the defect could collect the security by foreclosure. See, also, the recent case of Wallach v. Schulze, 22 App. Div. 57, where it was held that a purchaser of a bond and mortgage from one who has procured an assignment by using the money of the mortgagor for that purpose has a superior equity to that of a judgment creditor whose lien precedes the sale. The court said, page 62, "There are cases, and without them there would be reason and equity, in favor of an attack by a creditor, if directly

made against a mortgagor, or the person to whom a mortgage had been assigned, such assignment having been procured with the money of the mortgagor; but that would be upon the theory, not that the person taking the assignment obtained an invalid title, but that the title which, upon the record, was legal and valid, was open to attack and voidable as against creditors. The title which Zimmerman obtained to the bond and mortgage by the assignment cannot be regarded as void. The most that can be asserted of it is that it was voidable or assailable at the instance of creditors. Having a good title, therefore, Zimmerman, before such attack was made, assigned it to the plaintiff. As evidence of the plaintiff's good faith, he not only obtained the certificates from both Mrs. Juch and Zimmerman that the mortgage was a valid subsisting lien upon the premises; that there were no defenses, and that the full amount called for in the mortgage was unpaid, but he also obtained possession of the bond and mortgage, which was enforced by a complete record title in Zimmerman at the time of purchase. The equities of such a purchaser as the plaintiff, we think, are superior to those of a creditor who takes no action until a period subsequent to the purchase; and the right of such creditor to attack the title to the bond and mortgage while in Zimmerman's hands is not available against one who purchased as did the plaintiff."

The defendants, however, further contend that they have a direct equity as against the plaintiffs' mortgages, inasmuch as Nafis assured them when they invested that their mortgage was a first lien; that he was thereby estopped from asserting the two prior mortgages as prior liens, even if his title to them were unassailable; that his assignees could take no better title than he could convey; and that accordingly the plaintiffs acquired their mortgages subject to this equity of the defendants. It must be conceded that it is the settled law of this state that the *bona fide* purchaser for value of a nonnegotiable chose in action, such as a mortgage, takes it after maturity subject to all the equities patent or latent existing either against the mortgagor or in favor of third persons, but it is by no means settled that such equities are other than those which exist at the time, and are in some manner connected with the chose in action itself, when it was first endowed with legal life. I have found no satisfactory case in which the principle was applicable to the facts where the court has decided that the equities with which an innocent assignee was chargeable

could be incidentally created in the course of remote transmission of the security, still less that they could arise with respect to a subsequent incumbrance and the facts attendant upon its remote sale and transfer. When it is recalled that such choses in action were not assignable at common law, and that even after the rights of assignees were recognized by courts of equity the action was always in the name of the assignor, that is, the mortgagee, the significance of the test that the assignee could do only what the mortgagee could do will be appreciated. If the doctrine above referred to, and peculiar to this state, is to be now extended so as to charge purchasers of mortgage securities with the latent equities of subsequent incumbrancers, such equities having been created after the inception of the prior incumbrance, the extension should rest upon the clearest and most certain judicial authority.

The leading case relied upon by the defendants is of course Bush v. Lathrop, 22 N. Y. 545, but while the general principles asserted in that case have been frequently indorsed, they were notoriously inapplicable to the facts before the court, which called for a decision on the doctrine of estoppel and not because of the assignee's subjection to latent equities.

In Schafer v. Reilly, 50 N. Y. 61, the mortgage was given originally without consideration, and before it was negotiated for value, a new lien had been created upon the property. It was held that the purchaser was bound by the equity existing at the inception of the mortgage, and arising from the original failure of consideration. In other words, when he bought the mortgage it first became one.

In Trustees of Union College v. Wheeler, 61 N. Y. 88, the question related to the rights of a person having a contract interest in the equity of redemption prior to the making of the mortgage, and it was held that an assignee of the bond and mortgage in good faith and without notice acquired only a lien subordinate to the rights of the purchaser. "It is well settled," said Dwight, C., page 104, "that an assignee of a mortgage must take it subject to the equities *attending the original transaction.* If the mortgagee cannot himself enforce it, the assignee has no greater rights. The true test is to inquire what can *the mortgagee* do by way of enforcement of it *against the property mortgaged;* what he can do, the assignee can do and no more." And on the motion for reargument, he said, page 114, "It must accordingly be held to be still the law of this state, that the purchaser of a non-

negotiable chose in action, secured by a mortgage, takes it subject to the latent equities not only of the mortgagor, but of third persons." The expression "third persons" must be qualified, as was done in discussing another principle at page 122, by not extending it to "third persons in the correct sense of that expression; that is, to persons whose rights are external to the mortgage," and thereby limiting the rule as laid down on page 114, viz.: "that the chose in action *itself* is open to all defenses *growing out of the original transaction*, in the hands of any assignee no matter how remote."

In Greene v. Warnick, 64 N. Y. 220, the equity related to an agreement made at the time of the execution of two mortgages that neither should have priority over the other, and it was held that the assignee of the one first recorded obtained no preference.

In Crane v. Turner, 67 N. Y. 437, the equity existed at the creation of the mortgage, and Miller J., speaking for the unanimous court, said, page 439, "The principle is settled beyond peradventure that an assignee of a mortgage must take it *subject to the equities attending the original transaction.* If the *mortgagee* himself cannot enforce it, then the assignee has no greater rights. The true test is to inquire what can the *mortgagee* do by way of enforcement of it against the property mortgaged, and what he can do the assignee can do and no more."

In Viele v. Judson, 82 N. Y. 32, the question related to the effect of an unwarranted and fraudulent discharge of a mortgage, and it was held not to create a priority in a mortgage subsequently recorded.

In Owen v. Evans, 134 N. Y. 514, the rule is indeed declared to be much broader than these authorities justify, and is stated by Vann, J., as follows, page 519: "According to the rule, well settled in this state, however it may be elsewhere, the plaintiff, as assignee of the note and mortgage, when both were past due, took those securities subject to all the equities which third persons could enforce against *his assignor.* Our courts recognize no distinction between equities existing in favor of the mortgagor and those existing in favor of a third person, but hold that, in the absence of an estoppel, an assignee of a mortgage takes only the interest of his assignor, and subject to any latent equity in favor of any person. Bush v. Lathrop, 22 N. Y. 535; Schafer v. Reilly, 50 id. 61; Trustees Union College v. Wheeler, 61 id. 88; Greene v. Warnick, 64 id. 220."

It is to be noted, however, that the only question before the court was the determination of the true ownership of the same securities as between rival claimants, and the principle involved in the decision was that the owner, having once sold the securities, could not sell them a second time. It was not that the second assignee took subject to certain equities, but that he took nothing.

In Bank for Savings v. Frank, 56 How. Pr. 403, the precise question arose. There an agreement in writing was made and recorded by which the holder of a mortgage agreed to waive its priority over another, and it was held that an assignee without notice was not bound by the agreement. The case differed from Greene v. Warnick, *supra*, in that the agreement was made *after* the mortgages were negotiated. The court said, referring to the general rule that an assignee of a mortgage takes it subject to the equities (page 408): "But this general rule does not extend to equities other than such as attend the original transaction. *They must exist at the time of the inception of the mortgage*, at the time it springs into life. In all such cases the assignee takes subject to them, and he cannot defeat them simply by showing that he is a *bona fide* purchaser for a valuable consideration. In all such cases it is immaterial that he had no notice of their existence at the time of assignment. But where a mortgage had a valid inception as a subsisting and enforcible lien in the hands of the mortgagee to the full extent of its face, *equities arising thereafter* stand upon a different footing, and they are to be disposed of upon such other principles of public policy, or according to such statutory requirements, as the facts of the particular case may call for."

My conclusion, therefore, is that the plaintiffs, if *bona fide* purchasers, did not take subject to the defendants' equity arising from what Nafis said to the latter at the time of the sale of the $3,000 mortgage. If the action were against Nafis, the doctrine of estoppel would apply. If Kearney, the owner, had done with these mortgages just what Nafis did, that doctrine might be successfully invoked. But where the record owner of a first and second mortgage parts with the first mortgage to a *bona fide* purchaser for value, the title of such purchaser is not affected by the fact that the assignor had previously sold the second mortgage accompanied by a representation that it was a first lien.

There remains to be considered the question of good faith. The defendants insist that the consideration of one dollar only in the

assignment to Nafis is a circumstance tending to put the plaintiffs on inquiry and that they are chargeable with the consequences of a failure to inquire. Assuming this to be so, it is difficult to see how inquiry would have disclosed the existence of the defendants' claim to priority. The only suspicious circumstance being the nominal consideration, suspicion would have been instantly allayed in Mrs. Gearon's case by inquiry. Mrs. Davenport or her representative would have told her that although the assignment to Nafis was expressed as for one dollar, yet Nafis in fact paid her the full amount of the bond and mortgage. In Mrs. Squire's case, the answer is not so satisfactory. Inquiry of Mrs. Anderson would have presumably disclosed the existence of the defendants' mortgage, and the fact that Mrs. Anderson had no knowledge of the transmission of the first mortgage through her. But further inquiry of Mr. Roberts would have shown that Nafis at the time of the assignment to Mrs. Anderson paid the full amount of that bond and mortgage. The existence of a third mortgage is not of itself a fact which would deter an individual from purchasing a first one, and it would be the merest speculation to say that the investigation would naturally or necessarily have acquainted Mrs. Squire with the claim of priority herein asserted by the defendants.

These cases cannot be decided without probably entailing a serious loss on one or more of the parties. To visit this loss upon the plaintiffs would be in a large degree destructive of certainty in dealing with mortgages. A result which enforces the mortgages in the order of their record seems under the circumstances the most equitable disposition of the cases, and judgments are accordingly so ordered; but without costs.

Judgments accordingly, without costs.

AMELIA SCHWENCKE, Individually and as Executrix, etc., Plaintiff, *v.* LOUISA HAFFNER et al., Defendants.

(Supreme Court, Kings Special Term, January, 1898.)

Will — Construction of — "Heirs" — Partition.

Where a will, devising both real and personal property and excluding from its benefits a daughter and a grandchild, contains a provision that "upon the death of my wife, if she should die without

having again married, that then my said real and personal estate shall be equally divided, share and share alike, between my wife's children and my children then living, or their heirs," the word "heirs" is not to be deemed to have been used in its legal and technical sense, but in the sense of issue or descendants; and a division or distribution, made by means of an action of partition brought after the death of the wife, should be confined to the persons who come within the description of issue or descendants of the testator or of his wife, at the date of her death.

ACTION for partition.

Daniel Cameron, for plaintiff.

C. & T. Perry, for defendant Louisa Haffner.

J. Homer Hildreth, for defendant Rosa Huss.

Henry M. Birkett, for defendant Elizabeth Welch.

HIRSCHBERG, J. On the first trial of this action — a partition suit — the defense was a defect of parties defendant in that the grandchildren of both the testator and his widow had contingent interests and were not made parties. Judgment for the plaintiff on a trial of this issue of law was reversed and a new trial ordered. See report of case, Schwencke v. Haffner, 18 App. Div. 182. Since that decision and on the 29th day of June, 1897, the testator's widow died, and the rights and interests of the parties in the real estate are now to be finally determined.

Christopher Huss, the testator, died December 3, 1880, leaving Caroline Huss, his widow, and four children, all children of a former marriage, viz.: Amelia, Louisa, Charles and Elizabeth. At the time of his death, his widow had living issue of a former marriage, two children and a grandchild, viz.: George Zaeh and Bertha Zaeh, children, and Henry Himsell, grandchild, the son of a deceased daughter. The testator and his widow had no children in common.

George Zaeh died July 22, 1885, intestate and unmarried. Caroline Huss, the widow, and her daughter Bertha Zaeh executed a conveyance April 24, 1889, of all their interests in the es-

tate to the testator's children, Amelia Huss, now the plaintiff, Amelia Schwencke, Louisa Huss, now the defendant Louisa Haffner, and Charles Huss, equally. Charles Huss died December 22, 1895, leaving his widow, the defendant Rosa Huss, to whom he devised all his estate by will dated June 21, 1890, and admitted to probate January 21, 1896.

The widow, Caroline Huss, did not remarry. By the terms of the will of Christopher Huss, the full text of which will be found in 18 App. Div. 183, it was provided that "upon the death of my wife, if she should die without having again married, that then my said real and personal estate shall be equally divided, share and share alike, between my wife's children and my children *then living or their heirs.*" From the context and the fact that this provision embraces the personal estate, and that the daughter Elizabeth and the grandchild are excepted from its benefits, I conclude that the word "heirs" is not used in its legal and technical sense, but in the sense of issue or descendants. At the time of the widow's death, the only children living who could take were Amelia, Louisa and Bertha, and each would be entitled to a third, but for Bertha's conveyance. By her deed, she conveyed her third to Amelia, Louisa and Charles, and the one-third of that third which Charles thus acquired goes to his devisee, the defendant Rosa Huss. The other eight-ninths belong equally to the plaintiff and the defendant Louisa Haffner.

In the Matter of Baer, 147 N. Y. 353, the rule is stated as follows: "Where final division and distribution is to be made among a class, the benefits of the will must be confined to those persons who come within the appropriate category at the date when the distribution or division is directed to be made. Bisson v. W. S. R. R. Co., 143 N. Y. 125; Goebel v. Wolf, 113 id. 405-411; Teed v. Morton, 60 id. 506; In re Smith, 131 id. 239, 247. In such cases the gift is contingent upon survivorship, and if it vests at all before the date of distribution, it is subject to be divested by the death before that time of a person presumptively entitled to share in the distribution."

Decree will be settled in accordance with the terms of division herein stated.

Ordered accordingly.

THE PEOPLE EX REL. THE TITLE GUARANTEE & TRUST CO. *v.* HENRY H. HAGGERTY, as Register of the County of Kings.

(Supreme Court, Kings Special Term, January, 1898.)

New York city — Powers, under the new charter, of a commissioner of deeds in a county other than New York.

A person appointed under the charter of the city of New York (Laws of 1897, chap. 378, § 58) by its board of aldermen as a commissioner of deeds of said city and who, within the statutory period prescribed, took, subscribed and filed his oath in the office of the city clerk of said city and who, thereafter, filed a certificate of his appointment in the office of the clerk of the county of Kings and there took, subscribed and filed in its county clerk's office the oath required by law, is qualified to take oaths, affirmations, proofs and acknowledgments in any of the boroughs of the city of New York and the registrar of Kings county may be compelled by mandamus to accept his certificate to the satisfaction of a mortgage.

MOTION for peremptory writ of *mandamus* to compel defendant to receive certificate of satisfaction and to discharge a mortgage of record. The facts appear in the opinion.

Edwin Kempton, for relator.

William Hughes, for defendant.

N. H. Clement, for county clerk.

MADDOX, J. The respondent has refused to receive a certificate of satisfaction of a mortgage upon real property, recorded in his office, and also to discharge said mortgage of record, for the assigned reason that one Clayton, a commissioner of deeds of the city of New York, and before whom the acknowledgment to such certificate was taken, on January 13, 1898, "was not a competent official to take acknowledgment of deeds to be recorded in the county of Kings without additional authorization by the legislature," and relator seeks by *mandamus* to compel the reception of said certificate and the discharge of record of said mortgage.

On or about January 6, 1898, Clayton, a resident of the borough of Brooklyn, in the county of Kings, and in the city of New York, was by a resolution of the board of aldermen of said city appointed a commissioner of deeds of said city and he took, subscribed and filed in the city clerk's office, within the limited time, the oath prescribed by law. He thereupon filed a certificate of his said appointment in the office of the clerk of Kings county, and took, subscribed and filed in said county clerk's office the oath required by law.

The questions presented are as to the powers of a commissioner of deeds, appointed under section 58 of the charter, chapter 378, Laws of 1897, and the territory over which he may exercise his functions.

By that section, the board of aldermen, without the concurrence of the council or the approval of the mayor, was authorized and empowered to appoint commissioners of deeds, and it is therein provided that " any person hereafter appointed to the office of commissioner of deeds in and for the city of New York by the board of aldermen " shall, within a limited time and before entering upon the discharge of his duties, take and subscribe the oath of office therein prescribed. Commissioners of deeds in cities have, since the enactment of chapter 75 of the Laws of 1848, been appointed by the common council of such cities respectively. A commissioner of deeds may take oaths and affirmations " within the district in which the officer is authorized to act " (§ 842, Code of Civil Procedure); he " shall have power to take proof and acknowledgment of all written instruments " (§ 86 of the Executive Law, chap. 683 of the Laws of 1892, as amended by chap. 88 of the Laws of 1894), " and may take acknowledgment or proof of conveyance of real property " within " the district wherein " he is authorized to perform official duties. § 248 of the Real Property Law, chap. 547 of the Laws of 1896.

Subdivision 1 of section 4 of chapter 3, part 2 of the Revised Statutes provided that " no * * * commissioner of deeds for a county or city shall take any such proof or acknowledgment out of the city or county for which he is appointed." This section and the whole chapter were repealed, and, as appears by the revisers' notes, section 248 of the Real Property Law is a revision of that subdivision.

Section 10 of the Public Officers Law, chapter 681 of the Laws of 1893, requires the filing by a commissioner of deeds of

his oath of office " in the office of the clerk of the county in which he shall reside," and thus it seems most plain that, upon compliance with the several statutory requirements above noted, that a commissioner of deeds in and for the city of New York has power to take oaths and affirmations, proofs and acknowledgments of written instruments and conveyances of real property. But within what district, whether in the whole or only a part of the greater city, since it now embraces more than one county?

By the language of section 58 of the charter, in my opinion, a commissioner of deeds appointed thereunder has authority to take oaths, affirmations, proofs and acknowledgments in any of the boroughs of the city, for the office is, by that section, defined to be " in and for the city of New York," and the whole city is, therefore, the " district wherein such officer is authorized to perform official duties " within the contemplation of section 248 of the Real Property Law and section 842 of the Code of Civil Procedure.

An instrument proved or acknowledged within the city of New York before a commissioner of deeds of that city is entitled to be read in evidence or to be recorded in the county in which the officer resides without authentication by the certificate of the clerk of that county, provided the officer has filed in such county clerk's office the oath of office required by law. § 10, Public Officers Law. In the other counties, however, though embraced in whole or in part within the city, there must be such authenticatio' § 259, Real Property Law, chap. 547, Laws of 1896.

The motion is, therefore, granted, but without costs.

Motion granted, without costs.

THE PEOPLE EX REL. ALONZO BRYMER v. JOHN J. SCANNEL, as Fire Commissioner of the City of New York.

(Supreme Court, Kings Special Term, January, 1898.)

Office — Title of subsequent appointee cannot be determined on application for mandamus to reinstate.

Where a veteran and a member of the uniformed fire force of the city of Brooklyn is, as alleged, illegally removed from his position as a fire marshal of the city of Brooklyn by the fire commissioner of

the city of New York, acting under the powers given him by its charter (Laws of 1897, chap. 378, §§ 729-779) and a successor is appointed who qualifies and enters upon his duties, the court will not pass upon the title of the present appointee, holding office by color of title, in a proceeding instituted by the claimant by an application for a writ of peremptory mandamus, but will remit the claimant to his remedy by an action in the nature of a quo warranto.

APPLICATION for peremptory writ of *mandamus* to reinstate relator as fire marshal in the fire department of the city of New York, in the borough of Brooklyn.

The facts appear in the opinion.

Hugo Hirsh, for relator.

Wm. J. Carr, for defendant.

MADDOX, J. The relator, a veteran, was appointed fire marshal in the Brooklyn fire department on October 8, 1894, and, having qualified, entered upon and has since continued in the performance of his duties. On January 8, 1898, as he states in his affidavit, he was removed as such fire marshal by the defendant and one Gray was appointed as such fire marshal for the borough of Brooklyn, and he alleges that said removal and appointment were illegal and void. He asks that a writ of peremptory *mandamus* issue, commanding defendant, as fire commissioner, to reinstate him as such fire marshal, to recognize him as such, and to permit him to perform the duties of that office, claiming the immunity given by statute to veterans, and, also, as a member of the uniformed fire force against removal without charges and until after a public trial, under the provisions of chapter 371, Laws of 1889, and chapter 445, Laws of 1892.

By section 727 of the charter of the present city, defendant, as fire commissioner, had power to organize a bureau for the investigation of origin and cause of fires, the principal officers of which bureau are to be called fire marshals, and by section 779 he was "authorized to appoint and remove * * * a fire marshal to be seated in Brooklyn and to exercise his powers within the boroughs of Brooklyn and Queens;" by sections 779 to 782, inclusive, the powers and duties of a fire marshal are defined and specified, and by section 1548 every person appointed to any office

under the city government shall take and subscribe an oath of office, which shall be filed.

The opposing affidavits allege that on January 8, 1898, Gray was appointed fire marshal of the city of New York, to be seated in Brooklyn, and to exercise his powers within the boroughs of Brooklyn and Queens, "as provided by section 779 of the Greater New York charter;" that Gray, on January 10, 1898, took and filed his oath of office as required by law and entered upon the exercise and discharge of his duties as such fire marshal and "held such office and was engaged in the exercise and discharge of the duties thereof at the time of the service of the order to show cause" herein.

The position of fire marshal is a statutory office and the incumbent's functions and his salary are fixed by law. It is a public office. Matter of Hardy, 17 Misc. Rep. 668.

The allegation in the answering affidavits that Gray, at the time of the service of the order to show cause herein, the commencement of these proceedings, filled the office of fire marshal, and was then engaged in the exercise and discharge of the duties thereof, are conclusive upon us here and we must assume the truth thereof. People ex rel. Corrigan v. Mayor, 149 N. Y. 223; People ex rel. Lewis v. Brush, 146 id. 63.

The relator states that he was removed by the defendant on January 8, 1898, and Gray's incumbency in the office before the proceeding is shown by the opposing affidavits; hence, to grant this application would involve passing upon Gray's title to an office of which he was in possession under color of right. The power of the defendant to so appoint depends upon a construction of the various statutes and of several of the sections of the new charter, and thus a serious question is presented. Relator's proper remedy is, therefore, by an action in the nature of *quo warranto*, not by *mandamus*. People ex rel. Wren v. Goetting, 133 N. Y. 569; S. C., opinion in full, 44 N. Y. St. Repr. 503; People ex rel. Lewis v. Brush, 146 N. Y. 63; People ex rel. Drake v. Sutton, 88 Hun, 175; Matter of Hardy, 17 Misc. Rep. 669; People ex rel. Hoffman v. Rupp, 69 N. Y. St. Repr. 738.

I am not unmindful of the provisions of section 127 of the new charter for the retention of veterans "in like positions and under the same conditions" as existed prior to January 1, 1898, and I am also aware that pursuant to the provisions of section 1536 of the charter, the various officers therein named, in manner as therein provided, transferred "the officers and members of the uni-

formed force of the fire department of the city of Brooklyn, including the secretary * * * fire marshal * * * to the fire department as constituted by the Greater New York charter, and that such persons so transferred were assigned to duty in the borough of Brooklyn, in the same rank and grade as * * * held by them respectively" prior to the consolidation of the cities. See City Record, January 14, 1898.

If relator's removal was willful and wrongful, then he has, in addition to the action in the nature of *quo warranto*, his remedy under the statute, chapter 821, Laws of 1896, against the defendant for his damages sustained by reason thereof, and the defendant may also be proceeded against, charged with a misdemeanor. People ex rel. Broderick v. Morton, App. Div., 3d Dept., Nov., 1897, opinion by Parker, C. J.; People v. Vanderhoff, 15 Misc. Rep. 434.

But as to the last preceding question, I have nothing to do here, nor do I intend hereby to express any opinion thereon.

The Fallon case, 7 App. Div. 185, has no application to this case, and the main question presented here is not to be found in that case. The Stanley case, in 43 Hun, had reference to the rights of an assistant teacher, and the Drake case, 88 Hun, and the Vanderhoff case, 15 Misc. Rep., related to clerks and not to incumbents in a public office. For the reasons above stated, the application must be denied.

Application denied.

In the Matter of the Petition of ALFRED B. BRADLEY for an Order Revoking Liquor Tax Certificate No. 13,517.

(Supreme Court, Monroe Special Term, January, 1898.)

Liquor Tax Law — Assignee of a certificate conniving at illegal acts of occupants of a saloon — Cancellation.

Where it appears, in proceedings taken to revoke a certificate issued under the Liquor Tax Law (Laws of 1896, chap. 112), that, almost immediately after the certificate was issued, its owners assigned it to another although continuing to conduct the business themselves, and that they thereafter persistently violated that provision of the law which forbids the existence, in a room where liquors are sold, of any inclosed box or stall which prevents a full view of the entire room, and that they also unlawfully employed, to sell and serve liquors,

a person who, to their knowledge, had been convicted of a felony, the certificate must be canceled, notwithstanding the property rights therein of the assignee, as he must, by his conduct, be deemed to have assented to the unlawful acts of his assignors.

PETITION for order revoking liquor tax certificate.

Charles E. Bostwick, for petitioner.

Lewis H. Jack, for respondents.

DUNWELL, J. Proceeding for an order to revoke and cancel a liquor tax certificate under subdivision 2, section 28, of the Liquor Tax Law.

The certificate in question, No. 13,517, was issued May 1, 1897, to William E. Hall and Maurice J. Scollard, composing the partnership of Hall & Scollard, authorizing the sale of liquors under subdivision 1, section 11 of the Liquor Tax Law.

On the 4th day of August, 1897, the petitioner, Alfred B. Bradley, entered complaint with the department of excise that Hall & Scollard were violating the Liquor Tax Law.

This proceeding was brought into this court by said Alfred B. Bradley upon a petition alleging that said Hall & Scollard had in one of the rooms in which the traffic in liquors was carried on by them under said certificate an inclosed box or stall, which prevented a full view of the entire room in which they sold liquors by persons therein, in violation of subdivision h of section 31 of the Liquor Tax Law of the State of New York, which reads as follows: "And it shall be unlawful to have at any time in a room where liquors are sold any inclosed box or stall, or any obstruction which prevents a full view of the entire room by every person present therein." Also that said Hall & Scollard unlawfully permitted one John McKeough, who had been convicted of a felony, to sell and serve liquors upon said premises contrary to subdivision f, of section 31 of the Liquor Tax Law, which reads as follows: "And it shall be unlawful to knowingly permit any person who has been convicted of a felony to sell or serve any liquor upon the premises."

A referee was appointed upon the presentation of the petition to take the evidence relating to these charges. The petitioner appeared before the referee by his attorney, Charles E. Bostwick, Esq., and Hall & Scollard, and Stephen Rauber, assignee of said liquor tax certificate, by their attorney, Louis H. Jack, Esq.

It was conceded upon the hearing that Hall & Scollard sold

liquors under said certificate at their place of business, No. 22 Front street, city of Rochester, N. Y., from the date it was issued, May 1, 1897, to August 18, 1897. The alleged violation took place between these dates.

The evidence upon the hearing before the referee clearly established that Hall & Scollard did maintain at all times during the period they sold liquors under said certificate at their place of business, in a room where liquors were sold, an inclosed stall and obstruction formed by curtains suspended from wires overhead which prevented a full view of the entire room by persons present therein, in violation of subdivision h of section 31 of the Liquor Tax Law.

The evidence also establishes that said Hall & Scollard unlawfully permitted said John McKeough, a person who had been convicted of a felony, as was well known to said Hall & Scollard, to sell and serve liquor upon said premises during the occupancy thereof by said Hall & Scollard, and while they were engaged in the business of selling liquors upon said premises under said certificate, in violation of the provisions of subdivision f of section 31 of said Liquor Tax Law.

As to Hall & Scollard, it is not seriously contended but that the certificate is revocable as to them upon the alleged violation being established.

But, Rauber, who took an assignment of the certificate from Hall & Scollard almost immediately after it was issued to them, alleges that by his assignment, which is permitted by law, he acquired property rights in the certificate of which he cannot be deprived by the wrongful acts of Hall & Scollard.

Section 27, which authorizes the assignment, provides that the assignee, upon proper application, security, etc., and upon obtaining a proper indorsement thereon, by the officer who issued the certificate, may carry on the business at the same place. By section 25, the holder of such a certificate may surrender the same upon ceasing to traffic in liquors and obtain a rebate thereon for the unexpired term.

Thus it is seen that, by a proper assignment, rights may be acquired having a definite pecuniary value. The purchaser may employ the certificate to carry on the liquor business or may convert it into money by a surrender of the certificate and acceptance of the rebate.

But it must not be lost sight of that the liquor tax certificate is, after all, in the nature of a license granted by a law enacted

under the police power of the legislature. People ex rel. Einsfeld v. Murray, 149 N. Y. 367.

A prominent feature of the law is its restriction upon the traffic. In this case the assignee permitted Hall & Scollard to hold the certificate and carry on their business thereunder after the assignment to him and until the violation aforesaid was committed, without in any manner making it known that a change in the ownership thereof had taken place and without taking any of the steps, subsequent to assignment, necessary to reduce the certificate to his personal control or to realize the property value therein. In all probability he intended that Hall & Scollard should hold the certificate so long as they remained customers of his company, during the term for which it was granted, unless for some cause they should go out of business.

By taking this course, the assignee of the certificate permitted Hall & Scollard, to whom it was issued, to remain the possessors and holders thereof, and carry on the liquor business by means thereof. He thereby subjected the certificate to all risks that might attach to it from a violation of the law by them. Otherwise, the whole scheme of the statute providing for a revocation of the certificate for violations could be evaded by a process, the simplicity of which would lead to frequent, if not universal, resort thereto.

Being satisfied that Hall & Scollard are guilty of the violation of the Liquor Tax Law aforesaid, in permitting said McKeough to sell liquors upon their said premises licensed by said liquor tax certificate, after knowledge, on their part, that he had been convicted of a felony; and in maintaining said stalls and obstructions, preventing a full view of the entire room where liquors were sold by persons present therein, and consequently that said Hall & Scollard are not entitled to hold such certificate, the order asked for in the petition is granted, revoking and canceling such certificate, with a provision that the holder of said liquor tax certificate and any person having such certificate in his possession or control shall forthwith surrender said certificate to the officer who issued the same or his successor in office.

Costs to the amount of $70 are allowed against the three defendants, Hall, Scollard and Rauber.

Ordered accordingly.

WILLIAM T. LINTNER, as Assignee of WATSON P. HARVEY, for the Benefit of Creditors, Plaintiff, *v.* THE LONG ISLAND MUTUAL FIRE INSURANCE CORPORATION OF NEW YORK, Defendant.

(Supreme Court, Montgomery Special Term, January, 1898.)

Security for costs — A general assignee is not an "official assignee."

The provisions of section 3268, subdivision 4 of the Code of Civil Procedure, enacting, in substance, that where the plaintiff was, when the action was commenced, "the official assignee" of a debtor and where "the action is brought upon a cause of action arising before the assignment," the plaintiff may be compelled to give security for costs have no application to a general assignee for the benefit of creditors, nor can he be compelled to give security in an action brought by him upon a cause of action which accrued before the general assignment was made to him.

MOTION to vacate an order requiring plaintiff to file security for costs.

W. H. Jaycox, for plaintiff.

N. H. Anibal, for defendant.

STOVER, J. The motion is to vacate an order requiring the plaintiff to file security for costs. The order was granted under section 3268 of the Code of Civil Procedure. The plaintiff is the general assignee for the benefit of creditors. This action is brought upon a cause of action accruing before the assignment. It is claimed that the order is justified under subdivision 4 of section 3268. The section provides that "the defendant in an action brought in a court of record may require security for costs to be given, as prescribed in this title, where the plaintiff was, when the action was commenced, either * * *

"3. A person imprisoned under execution for a crime; or

"4. The official assignee of a person so imprisoned; the official assignee or official trustee of a debtor; or an assignee in bankruptcy; where the action is brought upon a cause of action, aris-

ing before the assignment, the appointment of the trustee, or the adjudication in bankruptcy. * * *"

It is claimed that the plaintiff herein is an official assignee. My attention is not called to any statute in which a like designation is made of an assignee for the benefit of creditors, although such assignees are frequently referred to. An official assignee, within the meaning of the section quoted, it seems to me, can be well defined to be a person appointed by, or under the direction of the court, and who derives his authority from some action of the court. There are assignees of this kind, and the provision of the section read in conjunction with the other provisions would seem to indicate that the legislature had in mind the assignees of insolvent debtors; for "Persons imprisoned under execution" are first mentioned, and immediately follows, "The assignee or official trustee of a debtor." Under the provisions of the Revised Statutes, the trustees of insolvent debtors were resorted to, for relief from imprisonment; and under the present provisions of the Code, an insolvent debtor may present his petition, with a schedule of his assets, and other matters required by the Code, and, upon certain facts appearing, the court must make an order directing the execution of an assignment by the debtor. Such an assignee may well be termed an official assignee. And in the same manner, trustees may be appointed of the insolvent debtor, and assignment may be made to him or them. Official assignees were known under the English law, but they were persons who were appointed by the court. Assignees in bankruptcy were known to the federal laws, but they were also elected or chosen by the court, or under the direction of one of its officers.

I think it may be said that it was this class of assignees that the provision of the Code referred to, and not one who derives his authority by virtue of a contract or agreement with the debtor.

If I am correct, the plaintiff is not within a description of any of the officers who are required to file security for costs, and the *ex parte* order should be vacated.

Motion granted.

HENRY P. McGOWN, JR., Plaintiff, *v.* MARY E. McGOWN, Answering by the Name of MARY E. BELL, Defendant.

(Supreme Court, New York Special Term, January, 1898.)

Divorce — A divorced mother permitted access to her infant child.

Where a child, aged three years, is intentionally kept by its father and custodian from all knowledge of, or intercourse with, its mother who has been divorced for her adultery, the court will, where the judgment in the action for divorce provides for such an application, permit the mother to see the child four times a year, in the presence of a referee, if that course is deemed necessary by the parties.

APPLICATION by defendant for an order granting access to her infant child.

Earley & Prendergast (E. C. James, of counsel), for motion.

Henry P. McGown (Charles Blandy, of counsel), opposed.

RUSSELL, J. The defendant applies under the reservation in the judgment for access to her child, which is now in the custody of her former husband, who has obtained a judgment of divorce against her. The parties have been separated since the 24th day of April, 1896. The charge of adultery upon which the judgment was entered was the cohabitation as a wife with Harry W. Bell, the defendant having married Bell, at Fargo, North Dakota, September 24, 1896, following the judgment of divorce just before obtained in North Dakota, on the ground of alleged cruelty of this plaintiff. This action was tried the 18th day of September, 1896, and resulted in a judgment on January 18, 1897. 18 Misc. Rep. 708; 19 App. Div. 368. The child is a son nearly three years of age.

The application would be perhaps premature were this an ordinary case. There are peculiar circumstances surrounding it. Did the application rest solely upon the address to the favor of the court for the benefit of the divorced wife, I should now refuse it. It is unnecessary to here repeat the former views of the court as to leaving the child of tender age in April, 1896, to proceed to a far western state and obtain a divorce upon a fictitious plea of residence there for the sole purpose of marrying a man she had

contracted an affection for during her marital life with this plaintiff, and then returning to the locality of her former home in New York city.

But other considerations supervene which are fairly displayed upon the record and the moving papers, although the application is apparently noticed as one for the benefit of the defendant. This court, on the hearing of the argument, suggested to counsel that the main element of consideration was as to the rights or welfare of the child himself. He is *non sui juris*. Some authority has to protect his interest and his rights. For substantially all the purposes of life, of guidance, culture and education, he has been confided to the care of the innocent husband, and properly so. If the attitude of that husband upon this motion had been that of willingness to repress the natural and just feelings of resentment he entertains for the wrongs he has suffered, and indicated a disposition that sometime in the not far future the child might see its mother, this motion would have been denied for at least the present occasion.

But the plaintiff frankly avows that he has kept from the child the knowledge of the mother's existence and so intends for all the future so far as he possibly can. This is undoubtedly according to the dictate of human nature and, so far as the mother is concerned, may be within the rights of the plaintiff. But a judgment as to the welfare of the son and a determination that he shall have no choice on the question whether he may or may not ever see or know the mother who brought him into this world, which is clouded to some degree by natural feelings of indignation and resentment against the mother, may be erroneously exercised; and the situation, therefore, leaves the court no recourse but to say that, either the child must be left without any knowledge of his mother until he is of an age to choose for himself when long years of want of knowledge of her may have reduced the natural feelings to a faint sentiment, or must allow to him the sight and knowledge of a mother at such intervals as will not at all seriously impair the control and guidance of the father, and yet will gradually prepare the offspring by such knowledge of her existence and occasional sight of her face for a better ability of choice than he would be able to exercise as to what the future relations with her shall be.

The decision thus resting upon this court, I cannot take the responsibility of denying such a privilege to the child. The sight

or knowledge of the mother ten or fifteen years hence may be practically worthless. Such knowledge now and henceforth may be that which the child in after years would determine was what should have been accorded to him. No harm can result by such occasional sight; nor is there any evidence before me that the daily life of this defendant is such as to injure that child by her occasional presence, his care, guidance and control being still in all things left with the husband.

I make the directions in general terms simply to see whether counsel may not agree upon more precise details. I think the mother should be admitted to the presence of the child at least four times a year until further order of the court. If that has to be done under the direction and in the presence of a referee to be appointed by this court who shall have charge of the details, it can be so done; but it seems to me that all such details might be arranged without the necessity of the supervision of an officer appointed by this court, the child to remain during such visits under the personal control of the husband, or of any friend whom he may choose to delegate for that purpose.

Ordered accordingly.

In the Matter of the Application of LAURA BRENTON McCORMICK et al., as Testamentary Guardians of THEODORA BRENTON ELIOT McCORMICK, an Infant, etc., under the Will of ELIOT McCORMICK, Deceased, for an Order Authorizing the Application of Income, etc.

(Surrogate's Court, Kings County, January, 1898.)

Will — Trustees are not absolutely required to apply the whole net income of an infant to her support, although a will so directs.

Where the will of a testator directs his trustees to apply the net income of the share of his infant child to her support, maintenance and education until majority, the trustees are not bound to apply the whole net income to such uses, without reference to the amount of the income or to the needs of the infant or to the circumstances under which she is being maintained; and upon application made to the surrogate, he will authorize such an allowance as he deems proper, having in view the circumstances, needs and station of the infant.

APPLICATION for payment of income of infant's estate.

Wilder & Anderson, for petitioner.

George G. Dutcher, for respondents.

Edwin Kempton, special guardian, in person.

ABBOTT, S. Eliot McCormick died on October 10, 1891, leaving a last will which was admitted to probate by the Surrogate's Court of the county of Kings.

The testator left him surviving his widow, the petitioner in this proceeding, and a daughter, Theodora, who was of the age of six months at the time of his decease.

By his will he devised to his widow his residence, then in course of construction, upon Dean street, which was of the value of about $16,500.

This property passed to the petitioner subject to a mortgage of $7,000 thereon. That mortgage has since been paid off by the petitioner and a new mortgage obtained to secure the sum of $8,000. These premises are not now occupied by the petitioner, but are rented by her and yield a net annual rental of about the sum of $150.

The said will gave and devised the testator's residuary estate to Edgar W. Abbot and Charles C. Cumings, the respondents herein, in trust as to one-half thereof to pay the income to his wife for life, with remainder, upon her decease, to his children, and as to the other one-half in trust "to divide the same into as many equal shares as I have children surviving me, and to set apart one share for each child and to apply the net income of each child's share to the support, maintenance and education of said child until such child arrives at the age of twenty-one years, when the principal of such share shall be paid to such child. Should any child die before attaining that age, the share of such child shall be distributed and conveyed in equal shares to his issue, if any; and in default of such issue, to my other then surviving children, and to the issue of any deceased child, in equal shares *per stirpes*, such issue to take the share which such child would take if living."

The petitioner and respondents in this proceeding were appointed guardians of testator's children, and the respondents were appointed trustees to carry out the provisions of the will.

The net income derived from the trust estate amounts to between $2,500 and $2,800 per year. Since the testator's decease, one-half of this net income has been regularly paid to the petitioner, and such portion of the remaining one-half of said income has been paid to the petitioner for the support, maintenance and education of the said infant as the petitioner and respondents have mutually and from time to time agreed upon.

No differences of opinion as to the amount necessary to be applied to such purpose seem to have arisen between the petitioner and respondents until the month of February, 1897. Their relations until that time were entirely harmonious, and no differences of opinion existed as to the sufficiency of the amount paid over for the support and maintenance of the infant Theodora.

The income of both mother and daughter will be about doubled within a few years from an additional fund of upward of $50,000 which will accrue to the estate of Eliot McCormick.

In February, 1897, the petitioner married Mr. Charles H. McDonald of the city of New York, and immediately thereafter claimed and insisted that it was the duty of the trustees, under the provisions of said last will and testament, to pay to her for the support and maintenance of said infant the entire net income realized from the one-half share of the trust estate invested for the infant's benefit, as well as all accumulations of income then in the hands of the trustees.

The matters which are really material to this application contained in the moving and answering papers submitted to me, are very brief. The voluminous petitions and affidavits presented are made up, to a large degree, of utterly and entirely irrelevant and immaterial matter which has no bearing whatever upon the true issue presented for my determination.

It is but fair to the trustees appointed under the said last will and testament, in view of the numerous suggestions and intimations contained in the moving papers of the petitioner, reflecting upon the performance of their trust duties by the respondents, that I should here state that the conduct and management of the said trust estate by the respondents has been peculiarly able, careful, wise and judicious, and so far from being subject to any adverse criticism by reason of such management, they are entitled to the thanks of both the petitioner and the infant for their wise and careful administration of this trust.

The income of Mr. McDonald at the time of his marriage to the petitioner was about the sum of $3,600 per year. The income of the petitioner derived from the estate of Eliot McCormick amounts to about the sum of $1,500 per year.

At the time of petitioner's marriage to Mr. McDonald he was occupying a small apartment in the city of New York, for which he paid an annual rental of $800. After his marriage, the apartment proved insufficient for the adequate accommodation of his larger family, consisting of himself, his wife, his own son, by a former marriage, of the age of eleven years, and the infant Theodora McCormick, who is now of the age of seven years, and he rented a three-story house in the upper part of New York, on St. Nicholas avenue, at an annual rental of $1,200, for the better accommodation of his family.

The sole question to be determined by me in this proceeding is whether the direction contained in the will of Eliot McCormick, "to apply the net income of each child's share to the support, maintenance and education of said child, until such child arrives at the age of twenty-one years," renders it necessary for the trustees to apply all of such net income every year to such support, maintenance and education, without reference to the wants and reasonable requirements of the infant, or whether such trustees are vested with a reasonable discretion in respect of the amount of such net income which shall be so applied in view of the age, surroundings and general environment of the infant.

It is strenously contended, in behalf of the petitioner, that the trustees are empowered to exercise no discretion whatsoever in this regard, but must apply each and every year the total amount of the net income derived from the trust estate to the support, maintenance and education of the infant; while on the other hand, it is contended with equal force, that the duty is cast upon the trustees to exercise a reasonable discretion and judgment in the disbursement of such net income.

A few of the principles discussed in briefs of both counsel are well settled and may be eliminated from this discussion, and without the necessity of citation of authorities.

1. Whenever a parent, whether father or mother, is possessed of an ample income, and is able to support, maintain and educate his minor child, the duty is cast upon him by law so to do, without calling upon such infant for any contribution thereto.

2. If, however, the parent has a limited income, while the infant is possessed of a large property and income, the parent is entitled

to a contribution out of the infant's income, not only on account of the support, maintenance and education of the infant, but, in many cases, if the amount of the income be large, the parent is entitled to maintain an establishment out of the income of the infant which shall be in keeping therewith, and with the station in life which the infant will be called upon to occupy, even though incidentally the parent shall derive considerable personal advantage and benefits from the maintenance of such an establishment.

We now come to the proposition: Must trustees, when directed to apply the income of a trust fund to the support, maintenance and education of an infant, so apply the whole of such net income without reference to its amount, the circumstances under which the infant is being supported and maintained or the requirements of the infant under such circumstances?

I am of the opinion that the trustees are not called upon so to expend the entire net income.

The general principle here involved was very fully and ably discussed by Mr. Surrogate Jenks, in Gladding v. Follett, 2 Dem. 58, which was affirmed at the General Term, 30 Hun, 219, and by the Court of Appeals, 95 N. Y. 652.

Surrogate Jenks reviews the earlier authorities and lays down the rule that where a trust is created to collect income and use the same for the education and support of a beneficiary until she becomes of age, the duty to apply the income arising from the fund is imperative, notwithstanding a direction by the testator that the income of the fund should be used for the education and support of the beneficiary in the discretion of the trustees.

This authority in no respect militates against the conclusion which I have reached. The effect of the decision in the Gladding case is, that the duty is imperative upon the trustees to apply to the support, maintenance and education of the beneficiary so much of the net income derived from the trust fund as may be necessary for his support and maintenance. There is nothing contained in the reasoning in this case from which the inference can be drawn that the duty is imperative upon the trustees to apply all of the income derived from the trust fund to the support and maintenance of the beneficiaries, for whose benefit the trust fund is created, without reference to the magnitude of the fund, or the amount of the income derived therefrom, or the conditions and

circumstances surrounding the beneficiary. It would be utterly absurd, for instance, to hold that an annual income of $50,000 or $100,000 must all and of necessity be used up in the support and maintenance of a mere infant. Upon the construction contended for by counsel for the petitioner, this would be absolutely necessary in all cases.

The fair inference to be drawn from all the cases cited by counsel in their respective briefs is, that when a fund is bequeathed to trustees to collect the income and apply the same to the support, maintenance and education of a beneficiary, if the beneficiary be an adult, he may insist upon the payment to him of the entire net income derived from the trust fund; but, if, on the other hand, such beneficiary be an infant, the trustee who is directed to make application of the income to the support and maintenance may exercise a reasonable and proper discretion under all the circumstances of the case as to the amount which shall be so expended and applied, and the surplus of such income, if any, becomes the property of the infant, and is vested in his general guardians and is applicable to his future requirements.

What then, under all the circumstances, as they appear before me upon this application, is a proper sum to be applied to the support, maintenance and education of the infant Theodora.

It is desirable that she shall enjoy all the advantages and luxuries of a refined and comfortable home; that she shall have a thorough education, and that her home surroundings shall be comfortable and elegant in so far as her ability to contribute to the same exists.

By reason of Mr. McDonald's change of residence from his apartment to the St. Nicholas Avenue House, his increase in rental amounts to $400, per year. Undoubtedly, there was rendered necessary also an increased expenditure in the ordinary cost of living. On account of this increase in the expenses Mrs. McDonald is able out of her private income to contribute the sum of $1,500 per year, making a total income derivable from Mr. McDonald and Mrs. McDonald, of $5,100 per year.

It is proper that the infant Theodora also should make some contribution to the increased expense of Mr. McDonald due to her residence with him as a member of his family, and I am of the opinion that this contribution should not be limited to the absolute cost of her maintenance as a member of the family, but should include a liberal amount to be expended in her behalf by her mother for the many luxuries of life to which she is now and will

hereafter in greater degree become entitled in view of her separate and independent individual income.

I am of the opinion that the sum of $900 per year is not too great an amount to be applied annually for the support, maintenance and education of this infant. Of this amount, I think, $300 per year should be paid to Mr. McDonald for board.

With reference to the income already accumulated in the hands of the trustees, I am of the opinion that no part thereof should be applied to the reimbursement of the petitioner for the amount claimed to have been expended by her for the benefit of the infant.

Ordered accordingly.

SAMUEL WANDELT, Respondent, *v.* DILLON B. BURNETT, Appellant.

(Supreme Court, Appellate Term, January, 1898.)

1. **Conversion — Money received in a fiduciary capacity — Check — Order of arrest.**

   Proof that, after a vendee had failed to pay a note which he had given for goods sold, he gave the vendor his check for the express purpose of taking up the note, and that, although the check was paid, the vendor never took up the note, and that the vendee was compelled, by action, to pay it to the holder, establishes a conversion and justifies the issue, against the vendor, of an order of arrest as for a "fraudulent conversion of money received in a fiduciary capacity."

2. **Same — Complaint.**

   A complaint, which alleges that the vendor and defendant fraudulently misapplied and converted the proceeds of the check to his own use, and that he falsely and fraudulently represented to the vendee and plaintiff that he had, with the proceeds of the check, taken up the note and that the same was paid, sufficiently avers a conversion.

3. **Same — Affidavit.**

   The sufficiency of an affidavit for an order of arrest considered.

APPEAL by defendant from an affirmance by the General Term of the City Court of an order denying defendant's motion to vacate an order of arrest.

Frederick W. Mattocks and John Jay McKelvey, for appellant.

William C. Reddy, for respondent.

DALY, P. J. The defendant sold a quantity of lumber to the plaintiff, receiving his note therefor to the order of "D. B. Burnett, agt.," the name under which defendant did business. The plaintiff did not have funds sufficient in bank to meet the note when it fell due, and afterwards delivered to the defendant, at his request, a check for the full amount and protest fees, which defendant promised and agreed to use for the purpose of taking up and returning the note to the plaintiff. The defendant endorsed the check, which was payable to his order, and it was paid at plaintiff's bank. But the note was not taken up and returned to the plaintiff, who was subsequently sued thereon by the holder, the First National Bank of New Haven, and he was compelled to pay it. This action was brought against the defendant to recover the loss sustained by the conversion of the proceeds of the check.

Upon the facts the plaintiff obtained an order of arrest against the defendant for a "fraudulent conversion of money received in a fiduciary capacity," and a motion by defendant to vacate the arrest upon the papers upon which it was granted was denied by the Special Term of the City Court, in an order which the General Term of that court has affirmed. This appeal is from such affirmance.

The ground of arrest, as set forth in the order of arrest above quoted, is fully sustained by the facts alleged in the complaint and in the affidavit for arrest. The complaint is criticised for its alleged statement of two inconsistent grounds of action, in averring that the defendant agreed to use the "check or its proceeds" to take up the note, and "fraudulently converted the check and its proceeds;" on the ground that the authorities distinguish between a check and money (Genin v. Schwenk, 62 Hun, 578), and that a charge of converting money cannot be sustained by proof of converting a check. It is, however, distinctly alleged in the complaint that the defendant "fraudulently misapplied and converted such proceeds to his own use," and did "falsely and fraudulently represent to the plaintiff that he had with the proceeds of such check taken up said note and that the same was paid." This is a positive allegation of the conversion of the money.

It is claimed that the affidavit for arrest does not support the complaint. The affidavit states that the defendant promised to take up the note with the check; that when suit was commenced on the note plaintiff saw the defendant and asked him how this happened, if he had not taken up the note, and why he had not used the check for the purpose for which plaintiff had given it; that defendant pro-

fessed surprise, and anger, and said that the lumber for which the note was given had come from one Goodrich, and that the note and check to take it up had been given to Goodrich, and that it was very wrong for Goodrich to do as he had done; that he, defendant, would help plaintiff out if he would pay part cash and give new notes for the balance of the old note and costs, which notes he would see were taken care of. The affidavit states that nothing was said to plaintiff about Goodrich or any other person as defendant's principal when the lumber was bought, when the original note was given, nor when the check was given to take up the note, and plaintiff charges that the defendant converted the check and its proceeds to his own use. It is not shown in the affidavit that the defendant cashed the check himself or caused it to be cashed, and the general allegation of the fraudulent conversion of the check and its proceeds is only a conclusion. But, nevertheless, the facts stated in the affidavit sustain the cause of action for conversion of the proceeds of the check. While the original note was made payable to the order of "D. B. Burnett, agt.," the check which plaintiff gave to the defendant to take up the note was made to the order of "D. B. Burnett," that is to say, to the defendant personally and individually, and was, in addition, delivered to him upon a personal trust which attached to the proceeds obtained by his endorsement and which, it may be fairly inferred, were received by him. Plaintiff was not bound to negative the unsworn statement of defendant that he was acting for a principal to whom he had transmitted both note and check. The check being made to him individually upon his agreement to use it as instructed, his failure to so use it by taking up plaintiff's note and returning it to him, and the cashing of the check upon his endorsement, create the presumption that he used the proceeds for his own purpose, and this was conversion of the money. Moffatt v. Fulton, 132 N. Y. 507.

Order affirmed, with costs.

McAdam and Bischoff, JJ., concur.

Order affirmed with costs.

DAVID B. DUNHAM, Appellant, *v.* EDWARD M. HARLAM, Respondent.

(Supreme Court, Appellate Term, January, 1898.)

1. **Practice — Effect of failing to move to dismiss the complaint at the end of the whole case.**

   Where no motion is made to dismiss the complaint in an action at the close of the whole case, the defendant admits that there is a question for the jury, and also waives the objections which he made upon his motion to dismiss the complaint.

2. **Services — Estimate of cost — How it may be sent.**

   Where the owner of a brougham has authorized a livery-stable keeper to have it repaired, the contractor may properly address and send an estimate of the cost of the repairs to the owner at the livery stable instead of at his private residence; or such an estimate may be sent directly to the livery-stable keeper as being the agent of the owner.

APPEAL by defendant from an affirmance by the General Term of the City Court of a judgment entered upon the verdict of a jury in favor of plaintiff for $203, besides costs.

Delos McCurdy and McCurdy & Yard, for appellant.

David M. Neuberger, for respondent.

DALY, P. J. The defendant had been sued for repairs made upon his brougham by plaintiff, which repairs were ordered by one Cammon, proprietor of the livery stable where the defendant kept his brougham, and the defense was that the defendant had not authorized Cammon to order the repairs. Cammon, however, testified that the defendant told him to get the brougham repaired, and, so, an issue of fact was presented which required the submission of the case to a jury upon that point.

The jury gave a verdict to the plaintiff for the full amount claimed by him. But it might be urged, upon the plaintiff's own evidence, that he was not entitled to so much; for his witness, Cammon, gave testimony which undoubtedly qualified his statement as to the defendant's direction to have the brougham repaired. Cammon testified that the brougham was injured while in his stable, by accident, and that he was to pay out of his own pocket for the repairs necessitated thereby, while the other repairs the de-

fendant was to pay him for. By the accident in question, one of the wings of the carriage was pulled off, and a deep indentation was made in the back by a shaft falling down behind it. The repairs required thereby were the ones to be paid for by Cammon. Other work was done upon the brougham, including a set of rubber tires, of the value of $85, and inside as well as outside renovation, and it must be assumed that the defendant's direction to Cammon to have repairs made referred only to those improvements and renovations, since Cammon was to make the others himself; and so the defendant, at most, would be liable for the repairs he ordered and not for those that Cammon was to pay for.

This point, however, was not made upon the trial, and the case was submitted to the jury without objection by defendant. We are unable to afford him relief upon any ground which is not presented by appropriate exception. Geitelsohn v. Citizens' Savings Bank, 20 Misc. Rep. 84. There was no motion to dismiss the complaint at the close of the whole case, and this was a concession that there was sufficient evidence to submit to the jury as to defendant's liability for value of all the repairs; and it was a waiver of the objections made upon the motion to dismiss at the close of the plaintiff's case. Scott v. Yeandle, 20 Misc. Rep. 89. There was no exception to the charge of the judge, which submitted the whole case to the jury. There remain to be considered, therefore, only the exceptions to the rulings upon evidence.

The plaintiff, in advance of doing the work, sent an "estimate" to defendant by mail, which it was claimed he kept without objection. This paper was addressed to him at 162 West One Hundred and Thirty-second street, which the witness testified was Cammon's stable. The objection was placed on the ground that there was no evidence that the defendant ever received it. It subsequently transpired that Cammon's stable was on the opposite side of the street, at No. 163 West One Hundred and Thirty-second street, but this was not the ground of objection to the letter when it was offered, or subsequently, when the location of Cammon's stable was proved. The chief ground of objection seems to be that the letter, although addressed to the defendant, was not sent to his house or place of business, but to Cammon's stable. As defendant had authorized the stable-keeper to have the repairs made, the estimate might properly be sent to the latter, and would have been admissible if addressed to him instead of the defendant, he being the defendant's agent in the matter. None of the other exceptions

to the rulings upon the evidence require notice. No error is pointed out by appellant's brief, and none is apparent upon the record.

Upon the merits of the case, it would seem that defendant was unquestionably liable to plaintiff for the greater part of the work done upon his brougham, and that he could have confined the recovery in the case to the particular sum for which he was liable, if he had called the attention of the court to this point upon the trial. For the reasons already pointed out, he has no remedy upon appeal to this court, as we can only correct errors of law presented by appropriate exceptions.

Judgment affirmed, with costs.

McAdam and Bischoff, JJ., concur.

Judgment affirmed, with costs.

William Hayes, Respondent, *v.* James Fay, Appellant.

(Supreme Court, Appellate Term, January, 1898.)

New York city — Sheath-piling not required by law in sewerage excavations — Negligence — Erroneous charge.

The provisions of the Consolidation Act (Laws of 1882, chap. 410, § 473, as amended by Laws of 1885, chap. 456, Laws of 1887, chap. 566, and Laws of 1892, chap. 275), relative to placing sheath-piling in excavations in public streets of the city of New York, do not relate to excavations for sewerage connections, as they are, by the same statute, placed under the exclusive control of the common council; and hence where an employe of a contractor with the city to connect a public sewer with adjoining property brings an action against the contractor to recover damages for injuries sustained by the fact that the banks of an excavation caved in, it is erroneous for the court to charge the jury that a person violating an express statute is a wrongdoer and as such is negligent in the eye of the law, and that the mere omission to comply with the statute is prima facie evidence of negligence, as such a charge ignores the material questions whether sheath-piling was, under the circumstances, necessary, whether the danger was not obvious and whether the plaintiff himself did not create the very danger of which he now compains.

Hayes v. Fay, 21 Misc. Rep. 538, reversed.

APPEAL by defendant from affirmance by the General Term of the City Court of a judgment in favor of plaintiff.

Daniel Daly, for appellant.

W. Stainton (J. P. Berg, of counsel), for respondent.

McADAM, J. The action is by an employee of the defendant to recover damages for injuries sustained March 7, 1896, while working on Second avenue near One Hundred and Twenty-second street, in an excavation made in the highway to connect the public sewer with adjoining property. The injuries are alleged to have been caused "by the carelessness and negligence of the defendant in not providing the plaintiff a secure and safe place to work, as was his duty to do, *in that he omitted and failed to sheath-pile said excavation* so as to prevent the same from becoming dangerous to life and limb, under the requirements of section 473 of chapter 410 of the Laws of 1882, and the amendments thereto made by chapter 456 of the Laws of 1885, chapter 566 of the Laws of 1887, and chapter 275 of the Laws of 1892."

The statutory provisions relied on constitute section 473 of the Consolidation Act, and, as their title plainly indicates, relate to the construction of buildings in the city of New York, and affect the building and fire departments of said city. The title of an act is sometimes an invaluable guide to its right construction (Endlich on Stat., § 59; 1 Kent's Com. 460, 461; Smith's Com., §§ 556, 557, 558; Brinckerhoff v. Bostwick, 23 Hun, at p. 239; Elby's Appeal, 70 Penn. St. 311; Matter of Village of Middletown, 82 N. Y. 196), particularly where it is a private or local bill, which must not embrace more than one subject, and that expressed in the title. Const., art. 3, § 16.

The statute invoked by the plaintiff does not relate to excavations made in the public streets for sewerage connections. Such excavations are under the exclusive control of the common council (Consol. Act, § 85, subd. 5), which is vested with power by ordinances "to regulate the opening of street surfaces, the laying of gas and water mains, the building and rebuilding of sewers," etc. These ordinances were not proved, do not appear in the case, and are not, therefore, before us for consideration.

Independently of any statutory provision a master is bound to furnish his servant a safe and proper place in which to do his

work; and an employer, if guilty of negligent omissions to guard against dangers which he ought reasonably to have anticipated, may make himself liable to an employee injured by the caving in of an excavation supposed by the servant to have been made safe by the master before being directed to enter it. Kranz v. L. I. R. R. Co., 123 N. Y. 1; Stuber v. McEntee, 142 id. 200. But the difficulty is that the present action was not tried, as the cases last cited were, with reference to the peculiarities of the particular situation, but upon the erroneous assumption that because the defendant did not comply with the provisions of section 473 of the Consolidation Act, *supra*, in regard to sheath-piling, such omission was in and of itself *prima facie* evidence of negligence, upon which the jury were authorized to find against the defendant.

Following this theory the court, at the plaintiff's request, charged the jury that "a person violating an express statute is a wrongdoer, and as such is negligent in the eye of the law," and that the mere "omission to comply with the statute is *prima facie* evidence of negligence in an action brought by one who has been injured." The defendant's counsel then requested the court to charge that the statute was inapplicable, and this request was declined. These rulings were duly excepted to.

Thus the violation of the provisions of a statute having no relevancy to the issue on trial was made the test of the defendant's liability, and the question of his negligence, independently of such provisions, was entirely brushed aside.

Whether sheath-piling was necessary to make the excavation reasonably safe, considering the nature of the soil, depth and width of excavation, the weather and the alleged frozen condition of the ground at the time; whether in view of the plaintiff's twenty years' experience on such work the danger was at once obvious to him, and, therefore, one of the assumed risks of his employment (Knisley v. Pratt, 148 N. Y. 373; Weston v. City of Troy, 139 id. 281; Hickey v. Taaffe, 105 id. 26, 35, 36; Ciriack v. Woolen Co., 146 Mass. 182; Dorney v. Sawyer, 157 id. 418); and whether the plaintiff himself did not create the very danger of which he complains (Collins v. Crimmins, 11 Misc. Rep. 24; O'Connell v. Clark, 48 N. Y. Supp. 74) — these were proper questions for the jury to consider before mulcting the defendant; yet the trial judge, instead of submitting them, gave a binding instruction, the effect of which was to hold the defendant a wrongdoer and as negligent in the eye of the law. This was almost tanta-

mount to a direction to find for the plaintiff, leaving open to the jury only the *quantum* of damages.

For this error, and without considering the other objections urged by the defendant, the judgment must be reversed and a new trial ordered, with costs to the appellant to abide the event.

DALY, P. J., and BISCHOFF, J., concur.

Judgment reversed and new trial ordered, with costs to appellant to abide event.

PAULINE WOLF, Appellant, *v.* GREGORIO DI LORENZO et al., Respondents.

(Supreme Court, Appellate Term, January, 1898.)

1. **Sale — Res gestae — Unsigned copy of an agreement of conditional sale.**

Where the complaint states two causes of action, one for goods sold conditionally and the other for goods sold absolutely, and the defendants claim that the goods alleged to have been sold absolutely were comprised in the conditional sale, they may prove, as a part of the res gestae, an unsigned instrument, furnished by the plaintiff, purporting to be a copy of the conditional agreement of sale and dated the same day, which does not show the articles which the plaintiff claims were sold absolutely.

2. **Same — Goods not in existence.**

Goods which, at the time of their alleged absolute sale, had been destroyed by fire, cannot be made the subject of sale.

3. **Costs — Collusive separation of answering defendants — Appeal.**

Where the plaintiff claims that the defendants have answered separately merely to tax separate bills of costs, she must show that their interests were identical and the severance collusive; and where that question is, upon a motion for a retaxation of costs, decided adversely to her, the resulting order, involving a question of discretion, is not appealable to the Appellate Term.

Wolf v. Di Lorenzo, 21 Misc. Rep. 521, dismissed.

APPEAL by the plaintiff from an affirmance, by the General Term of the City Court of New York, of a judgment rendered upon a verdict in her favor upon the second cause of action alleged, after dismissal of the complaint as to the first cause of

action. Also appeal from affirmance of order denying plaintiff's motion for a retaxation of costs in the court below.

George W. Glaze, for appellant.

Leopold Leo, for respondent Gregorio Di Lorenzo.

John L. N. Hunt, for respondent Johanna Di Lorenzo.

BISCHOFF, J. The plaintiff, a dealer in household furniture, sold certain articles to the defendants under a conditional agreement of sale, expressed as a contract of rental, but looking to the final passing of title to the purchasers upon their duly making payment of an agreed sum in stated installments. For a first cause of action, the complaint set forth the delivery under this agreement, but no default of the agreed payments was alleged, and the demand for judgment was based solely upon allegations of a modification of the contract whereby the goods were sold to the defendants absolutely, and of their failure to pay the price agreed upon on such sale.

The right of the plaintiff to recover upon the second cause of action for the purchase price of another and distinct bill of goods, sold to the defendant unconditionally, was conceded at the trial except with regard to an item of $17.50, representing the price of certain rolls of matting which were claimed by the defendants to have been purchased under the first, or conditional, contract, and so not properly the subject of recovery upon the second cause of action.

Since the complaint was dismissed as to the first cause of action, for failure of proof, the only question remaining for the jury was whether or not this item of $17.50 was for goods purchased in the course of the second transaction, and they have found that it was not, but upon evidence the admissibility of which is attacked by the appellant.

To support their claim that the item in question was included among the goods sold under the conditional agreement, and so not applicable to the second cause of action, the defendants offered in evidence a paper framed substantially as a duplicate of that agreement, but unsigned, and containing a schedule of the goods referred to in the body of the paper as the subject of the transaction. In this schedule appeared the item of $17.50 for mat-

ting, which item did not appear in the schedule annexed to the executed agreement, which remained in the plaintiff's hands, but it was admitted that the paper produced by the defendants had been prepared by the plaintiff and given to them by her, upon their request for a memorandum of the articles covered by the agreement.

The objection to the reception of this paper in evidence, upon the ground that it tended to vary the written contract, was not well taken. The paper, having been drawn up by the plaintiff, and purporting to be a memorandum of the written agreement bearing the same date, was, under the circumstances, admissible as a part of the *res gestae* (Eager v. Crawford, 76 N. Y. 97), and from the defendant's further evidence, received without objection, it appeared that the item in dispute was, in fact, the subject of the conditional sale.

The remaining point raised by the appellant has to do with the propriety of the dismissal of the complaint as to the first cause of action, but we think, as to this, that there was a total failure of proof of the allegations and that the ruling was correct.

As alleged, so far, the action was for the full purchase price of the goods delivered under the conditional agreement, the demand being based upon a subsequent sale of those goods, absolutely, but, from the only evidence given in support of the defendants' promise to pay the full price as upon a sale, it appeared that this promise was made and the sale in form concluded at a time when, within the full understanding of all the parties, the goods had been totally destroyed by fire. Hence, there was no subject of sale and no possibility that the minds of the parties had met upon a sale.

The conditional agreement contained a clause giving a right to the plaintiff, in case of default, to remove the goods and to "collect all reasonable charges for the use thereof and expense of removal, and injuries thereto," and, according to the plaintiff's evidence, it appears that the defendants conceded or assumed that they were liable for the value of the property, as destroyed by fire when in their possession, since, after the fire, the defendant Gregorio Di Lorenzo approached the plaintiff's agent upon the subject, and, apparently recognizing the indebtedness, assented to the plaintiff's proposal that an absolute bill of sale be taken by the defendants and payment made as soon as their circumstances rendered it possible. Whether or not there was a promise

to pay for the goods destroyed enforcible by the plaintiff is not a question which is now presented, but, assuming that there was a possible ground of recovery, that ground was not the subject of this action, which proceeded solely upon a sale, and no consent to litigate a cause of action other than that pleaded could be inferred from the defendants' failure to object to the admission of the evidence of this promise, since such evidence was relevant to the issue of the alleged sale.

The questions above considered cover the points raised by the appellant, so far as the matters in argument are presented by objections and exceptions duly taken at the trial, and we conclude that the judgment should be affirmed, with costs.

By appeal from the affirmance of an order denying a motion for a retaxation of costs, the appellant seeks to present to this court the question whether these defendants, separately answering and appearing by separate attorneys, were properly permitted to tax separate bills of costs, there being no dispute that the defendants became entitled to costs, generally, because of the plaintiff's failure to recover $50 in the action.

It is said that the separate appearance was collusive and was merely for the purpose of enabling the defendants to tax more than one bill, but the matter is not one which may be addressed to the consideration of this court.

Successful defendants who have interposed separate answers, and have separately appeared, may insist that their several bills of costs be taxed by the clerk, as of course, and the plaintiff, if contesting the taxation, must sustain the burden of showing that the defendants' interests were identical and that the severance was collusive. D., L. & W. R. R. Co. v. Burkard, 40 Hun, 625.

Accordingly the motion for retaxation proceeded upon a question of fact, calling for the exercise of discretion by the court below, and the resulting order is not appealable to the Appellate Term. Kreizer v. Allaire, 16 Misc. Rep. 6.

Appeal from order dismissed, with costs.

DALY, P. J., and MCADAM, J., concur.

Judgment affirmed, with costs and appeal from order dismissed, with costs.

MEYER LEVISON, Appellant, *v.* THE SEYBOLD MACHINE CO., Respondent.

(Supreme Court, Appellate Term, January, 1898.)

1. **Goods sold — A machine to be repaired by the vendor after sale — Resale — Waiver.**

   Proof, in an action brought to recover the price of a machine, that it was not in good repair and was purchased by the vendee upon the terms that it should be paid for in thirty days after it had been put in perfect order at the expense of the vendor, that it had been then tried by the vendee and had proved satisfactory, accompanied by proof that, after making very slight repairs, the vendee, within a week of the purchase, sold it to a third person, entitles the vendor to recover the price, as the vendee has accepted the benefit of the purchase, and, by the resale, has waived its right to have the vendor repair the machine.

2. **Evidence — Declarations in one's own favor.**

   The letters of a party are not admissible to support its version of a verbal agreement.

APPEAL by plaintiff from a judgment of the First District Court in favor of defendant.

Sidney J. Cowen, for appellant.

Louis W. Stotesbury and Shaw, Baldwin & Stotesbury, for respondent.

DALY, P. J. This action was brought for the price of a second-hand book-binding machine sold by the plaintiff to the defendant. The defense was a general denial; but the defendant was allowed on the trial to prove that the machine was not in perfect order at the time of the sale, and that an agreement was then made between the plaintiff and the defendant's agent, Elmendorf, who made the purchase, that the defendant was to take the machine and put it in perfect order at the expense of the plaintiff, who was to furnish the necessary parts for that purpose; and that the terms of payment, according to Elmendorf's testimony, were to be "thirty days after the machine was put in perfect order by placing it in our (defendant's) establishment, and having it tried and see if it works satisfactorily." Evidence was given on defendant's behalf to show that the machine could not be put in perfect order under the cost of a new one, and plaintiff's claim was resisted on these facts.

The defendant established by its own evidence that it had a duty to perform under the agreement as thus set up, namely, to put the machine in perfect order at plaintiff's expense, and to keep it in its establishment for thirty days to try it and see if it worked satisfactorily; and this agreement, it was also established by defendant's own evidence, it wholly failed to perform. When it received the machine it bought several parts for it, "as few as possible, as long as we did not want to go into expense," and it was not put in perfect order, because the defendant "put in as few parts as necessary." While it was in this state, and within five or six days after the defendant received it, it was sold by the latter to a party in Newark with the privilege of returning it in thirty days if not satisfied. It was returned in about five weeks, and notice was given to the plaintiff.

Upon this state of facts the plaintiff was clearly entitled to recover. The defendant would have been fully protected by its agreement if it had performed its part; but this it did not attempt to do. It was bound to put the machine, if possible, in perfect condition and to keep it in its place on trial for thirty days and then to return it if it could not be put in perfect order. Instead of doing so, it sold the machine in less than a week, in its alleged imperfect condition. This was a clear waiver of all right to have the machine made perfect and to a trial of it and to the return of it, if unsatisfactory; and was an unquestionable election to accept the machine in its then condition. All rights against the plaintiff under the agreement were waived in order to obtain the advantage of the sale to the Newark purchaser; and having thus elected to accept the machine and waive the benefit of the agreement, that agreement cannot be interposed to the plaintiff's recovery.

With respect to exceptions appearing upon record, it should be noted that the defendant was allowed to put in evidence its own written statement of its version of the agreement contained in a written order on the plaintiff for the delivery of the machine after the sale. This method of making evidence by its own letters is not permissible. Waring v. U. S. Tel. Co., 4 Daly, 233.

Judgment reversed, and new trial ordered, with costs to appellant to abide event.

McAdam and Bischoff, JJ., concur.

Judgment reversed, and new trial ordered, with costs to appellant to abide event.

ROBERT FLAHERTY, Respondent, *v.* THE HERRING-HALL-MARVIN SAFE CO., Appellant.

(Supreme Court, Appellate Term, January, 1898.)

1. **Master and servant — Offer of a new rate of compensation — Dismissal — Measure of damages.**

Where a servant, working for wages and commissions, is notified by the master that he will thereafter receive another rate of compensation, and, having taken no action upon the offer, is discharged at the end of that week, he may recover compensation therefor upon the terms of the original employment.

2. **Same — Bar — Another action pending.**

An action already brought to recover damages of a corporation for having prevented its servant from earning commissions, is not a bar to a second action brought by him against it for commissions earned.

3. **Evidence — Code of Civil Procedure, section 829, does not apply to transactions with deceased officers of corporations.**

A corporation cannot invoke section 829, Code of Civil Procedure, in order to exclude testimony of a conversation had by a party with its managing director, as that section has no application to personal transactions with deceased officers or agents of a corporation.

APPEAL by defendant from a judgment of the justice of the First District Court in favor of plaintiff for $61.66 damages and costs.

Lawrence & Hughes, for appellant.

H. P. Okie and respondent in person, for respondent.

DALY, P. J. The plaintiff was employed by the defendant as salesman to get orders for safes and work, and was to receive a salary of $30 per week and a commission. This action was brought for salary for the week ending July 11, 1896, being, as he claims, the last week of his service; and also for a small sum as commission. The defendant contends that he was discharged one week previously. It appears from the evidence that on the 3d of July, 1896, he received a letter from the defendant stating that on and

after that date his salary would be $35 per week, without commissions either on work that he had already furnished specifications and bids for or that might come up in the future. He attended at the defendant's place of business every day as usual during the ensuing week and endeavored to obtain a modification of the company's decision, but without success, and, on the 11th of July, 1896, received a further letter stating that, since he did not accept its proposition of the third instant, his connection with the company ceased on that date, and that since that date he had not been in the employ of the company nor had any connection with them.

The discharge of the plaintiff from his employment undoubtedly occurred at the time of the last letter. The defendant, having in effect given plaintiff one week to consider its proposition, could not make its decision to discharge him for refusal to accept relate back to the time of that proposition. It is equally clear that, until he was discharged, his salary and commission remained at the original rate, since it was conceded by defendant's letter that he had not accepted the proposition for a reduction. After notifying him of his discharge for not accepting, defendant cannot claim that he remained over under an implied acceptance. He was, therefore, entitled to salary at the old rate and commissions earned.

The commissions claimed ($15) accrued after his discharge in connection with orders procured by him prior to his discharge. They were for extra work on those orders and his testimony was that they were payable under the custom of the Marvin Safe Company as specified in his agreement. The defendant opposed the claim for commissions on the ground that plaintiff had another action pending for commissions. His complaint in an action in the Supreme Court, commenced after his discharge, to recover damages for preventing the plaintiff from earning commissions was put in evidence. That complaint was based upon a clause of his agreement with the company which gave him the exclusive privilege of closing up sales to parties with whom he opened negotiations; and it was alleged that sales of a large number of safes and vaults were in course of being negotiated by him and would have been successfully terminated, if it had not been for defendant's breach of the agreement in refusing to complete such sales through him, and defendant's closing them itself after discharging him.

The claim in that action is for damages for preventing the plaintiff from earning commissions; while the claim in this action was for commissions actually earned upon orders obtained before his

discharge. The pendency of the Supreme Court action was, therefore, not a bar to the present action.

The plaintiff established his agreement with the company by proof that, according to a conversation with Mr. Marvin, defendant's managing director, plaintiff drew up and signed a paper containing certain terms of employment, of which he sent a copy to Mr. Marvin, who told him he had received it and that it was all right and that Mr. Herring would set him at work; and that subsequently Mr. Herring set him to work and afterwards fixed the amount of salary and commissions he was to receive. All this testimony was competent to establish a parol contract of employment. Objection was made to plaintiff's conversations with Mr. Marvin, because the latter had since died; but nothing in section 829 of the Code applies to personal transactions with deceased agents or officers of corporations.

The judgment should be affirmed.

McAdam and Bischoff, JJ., concur.

Judgment affirmed, with costs.

George Woetjen, Respondent, *v.* Morris Gellert, Appellant.

(Supreme Court, Appellate Term, January, 1898.)

Goods sold — Vendee not present at nor occupying the place of delivery — Bills made out to a third person.

Where it appears in an action, brought to recover the price of goods, that the bills for the goods sold and delivered were made out to the son of the defendant, that the defendant did not occupy and was not present at the place of delivery at the time of the deliveries, and where the plaintiff is in doubt as to the particular year in which he made them, a judgment in his favor must be reversed.

Appeal by defendant from a judgment of the justice of the First District Court in favor of plaintiff for $166 damages and costs, rendered September 13, 1897.

Alfred and Charles Steckler, for appellant.

August P. Wagener, for respondent.

DALY, P. J. The plaintiff, a milk dealer, claimed $116.11 balance for milk furnished, as alleged, to defendant, a retail dealer, between March 3 and May 7, 1893, and recovered judgment for the full amount, with interest. The answer was a general denial. It is claimed that plaintiff failed to prove his case.

The milk was delivered at the corner of Avenue C and Houston street, and deliveries commenced, according to plaintiff's evidence, some time before the first date mentioned upon orders given, as alleged, by defendant about half a year before. This was the plaintiff's testimony, and his driver testified that he knew the defendant and delivered the milk to him at the place mentioned. On defendant's behalf, a witness, Max Lowenthal, testifies that from 1889 to August, 1893, he kept a grocery at 356 Houston street, which, it appears from the plaintiff's own exhibit, is the corner of Avenue C, and that he took milk from one Eschweig, and that the defendant had nothing to do with the business. The agent of the owner of the premises occupied by Lowenthal was called, and testified that the latter was the tenant of the place during the period in question, and that the defendant had nothing to do with it. The defendant, in his own behalf, testified that he was not in the place between March 3 and May 7, 1893, and bought no milk between those dates from the plaintiff; that he did occupy the place from August, 1893, after Lowenthal moved out, and took milk from the plaintiff and paid for it; that the bills produced on the trial by plaintiff were made out to "A. Gellert," who was his son.

Plaintiff being recalled stated that he delivered milk to A. Gellert, defendant's son, at a different place, namely, in Rivington and Attorney streets; but he could not say if the bill for it was in 1894, and in answer to the question, "Will you swear this was not sold in 1894?" he answered, "I don't know." If this question referred to the charge in suit (and it may be inferred that it did), then the plaintiff confessed to doubts as to the year in which he made the deliveries sued for, and his whole right to recover depended upon his establishing by satisfactory evidence that the defendant was responsible for deliveries during the period claimed for.

It is manifest from the testimony of disinterested witnesses that, during the period of the alleged deliveries of milk to the defendant at the corner of Houston street and Avenue C, that place was kept by a stranger, and that no milk was delivered there to the defendant.

The judgment will, therefore, have to be reversed and a new trial ordered.

McAdam and Bischoff, JJ., concur.

Judgment reversed and new trial ordered, with costs to appellant to abide event.

Jane Humes, Appellant, *v.* Alfred A. Gardner, Respondent.

(Supreme Court, Appellate Term, January, 1898.)

Eviction — Ordinary inconveniences will not justify a tenant in abandoning.

Ordinary inconveniences suffered by a tenant, arising from the facts that gas in the main hall of an apartment-house was not lighted as early as it should have been; that at times the front door bell was not answered; that three times within two weeks a pump broke down and on one occasion cut off the water supply for an hour and one-half; that the back stairs were frequently not lighted; that an important package from a druggist was not delivered; that on several occasions the milkman was compelled to leave milk outside the premises, and that coal was sent up by a dumb-waiter at inconvenient times, do not constitute an eviction which justifies the tenant in abandoning the premises, nor does it relieve him from the payment of the rent.

Appeal by the plaintiff from a judgment of the justice of the Sixth District Court in favor of the defendant.

Frank M. Tichenor and Benjamin Wright, for appellant.

William J. Kelly, for respondent.

Daly, P. J. The action was for one month's rent, $55, of an apartment in premises No. 148 East Thirty-sixth street, leased to defendant at first for eight months, the lease being renewed in September, 1895, and again in September, 1896, for one year. Before the expiration of the second renewal, and in March, 1897, the tenant left the premises, claiming to have been evicted therefrom by acts of the landlord which deprived him of the beneficial use and enjoyment thereof. This action was for rent for the month of April, 1897.

The grievance of the tenant, as formulated by his counsel, on the trial, was that "it was impossible to live in the house on account of the conduct of the janitor and that the landlord admitted the failings of the janitor and promised to remedy them." The evidence disclosed negligence with respect to the lighting of the main hall and back stairs; restrictions in the supply of water from the tank; delay in answering the front door bell; negligence in receiving merchandise; disturbance of quiet in the manner of sending up coal in the dumb-waiter; inattention of the janitor, etc. The most serious complaint made by the tenant was with respect to an occurrence for which the landlord was not responsible, namely, a dangerous escape of gas into the apartment upon one occasion owing to the want of proper precautions by plumbers working in the cellar.

In order to justify a tenant in quitting the demised premises it must appear that the landlord consents or suffers acts to be committed which are an obstruction to the beneficial enjoyment of the premises and make it necessary for the tenant to remove. It should appear that the landlord has persistently neglected his duty and that the apartment thereby becomes unfit for occupancy. Tallman v. Murphy, 120 N. Y. 345. In the case before us the extent of the annoyances from the fault of the janitor, treating the defendant's evidence as true and leaving out of view the denials on the part of the plaintiff, appears to be this: the gas in the main hall was not always lighted on winter afternoons as early as it should have been; the janitor or his wife failed on several occasions to answer the front door bell; on three occasions within two weeks the pump broke down and the water from the tank had to be used sparingly, on one occasion the supply stopping completely for an hour and a half; the lighting of the back stairs was frequently neglected, and on one occasion the fixtures were removed for two days; on one occasion the janitor neglected to receive an important package from the druggist, and on one or more occasions compelled the milkman to leave the milk outside; and frequently sent the dumb-waiter up to the apartment with coal while the family was at breakfast and persistently rang the bell until the coal was taken off.

It would probably be difficult to find in the annals of housekeeping, whether in a whole house or in an apartment, any case in which the family has not experienced, as ordinary incidents of housekeeping, quite as much inconvenience as the defendant here com-

plained of. The service which the landlord agreed to furnish could not be expected with unvarying regularity and precision. It was to be supplied by means of ordinary domestic service; and the question whether the contract was performed is to be determined by reasonable rules. If there was generally a substantial performance, and no evidence of an intent not to perform or of a continuous failure to perform, then omissions which are not in their nature both serious and persistent will not prevent a recovery. The inconveniences experienced by the defendant in this case were ordinary in their character, and fall far short of what may be deemed a deprivation of his beneficial enjoyment of the premises.

Judgment reversed and a new trial ordered, with costs to appellant to abide the event.

McAdam and Bischoff, JJ., concur.

Judgment reversed and new trial ordered, with costs to appellant to abide event.

Eliza Bowler, Respondent, *v.* The American Box Strap Co., Appellant.

(Supreme Court, Appellate Term, January, 1898.)

Corporations — By-law fixing the salary of president — Modification — Consideration — Acquiescence.

A by-law of a corporation, fixing the salary of its president, may be validly modified by an executed parol agreement, made between and acquiesced in by the parties, by the terms of which the president accepted a lower salary in consideration of being continued in office and employment; the modification being made necessary by the necessities of the corporation.

Appeal by the defendant from a judgment entered upon the verdict of a jury in favor of plaintiff in the Thirteenth District Court.

Howard S. Gans and Stern & Rushmore, for appellant.

George B. Covington and Heyn & Covington, for respondent.

Daly, P. J. The action is brought to recover $50 for salary alleged to be due the plaintiff's assignor, Mr. Bowler, as president of

the defendant corporation, for the week ending October 16, 1897. Mr. Bowler was elected president upon the organization of the company in 1895. When he took office he agreed to and did attend to the manufacturing business of the company and took charge of it as overseer; the company being organized to manufacture under his patents assigned to it, he receiving twenty-eight and one-third shares of its capital stock of 100 shares.

The by-laws prescribed a weekly salary of $50 for the president. Mr. Bowler was paid at that rate to December, 1895, when he agreed to accept $30 per week, and received it until January, 1897, when he agreed to take $25 per week and continued at that rate until May, 1897, when he accepted $15 per week which he received until June 12th, when he ceased to perform any further work as overseer, but continued to act as president down to the commencement of this action. The services which he gave as overseer were rendered pursuant to an agreement with the organizers of the company prior to its incorporation.

The several reductions of pay were proposed to the president by the company and agreed to by him upon the representation, in effect, on each occasion that the company could not continue and would have to be closed out unless he agreed to receive the lesser compensation for his services. By the acceptance of these lesser sums the president consented to a modification of the original contract and the agreement for such modification was founded upon a good consideration, to-wit, his continuance in office and continued employment, which were dependent of course upon the existence of the company. He testified that upon one occasion he was informed in effect that his salary would be restored when new machinery was put in and the business would pay; but this was no more than an agreement to give the full rate when the company could afford it, and no proof was offered that this point was ever reached in the business of the concern.

There can be no doubt that a valid modification of a by-law of a corporation fixing the salary of its officer can be effected by an executed parol agreement between the company and the officer and that the conduct of the parties is evidence on the question of such agreement. A by-law may be modified by usage and acquiescence. 5 Am. & Eng. Enc. L. (2d ed.), 91, and cases cited. In this case it is apparent that for satisfactory reasons the by-law fixing the salary of the president of this company ceased to be operative within a year after the company was organized and that a usage

was substituted whereby the compensation of that officer was fixed from time to time by agreement. There seems to have been no action by the parties which warranted a finding that it had ever been restored to the original sum, and so the verdict for the plaintiff rests upon no legal foundation.

Judgment reversed and new trial ordered, with costs to appellant to abide event.

McADAM, J., concurs.

Judgment reversed and new trial ordered, with costs to appellant to abide event.

MICHAEL NOTARA et al., Appellants, *v.* CONSTANTINE DE KAMALARIS, Respondent.

(Supreme Court, Appellate Term, January, 1898.)

1. **Bar — Another action pending — When another cause of action need not be pleaded by the defendant.**

Where the plaintiffs bring an action for the conversion of the proceeds of a single consignment of cigarettes alleged to have been intrusted to the defendant for sale on commission, the defense of another action pending is not made out by proof of another action, pending in the City Court of New York, a court of record, brought by the defendant against the plaintiffs, in which he seeks to recover commissions as their agent during a term of five years upon various sales made by him, as the rule is that, where the first action is commenced in a court of record, the defendant need not usually interpose, as a counterclaim, a cause of action which he may have against the plaintiff, but may bring an independent action therefor.

2. **Evidence — Admissions of an agent, in custody upon a criminal charge — Proof.**

Admissions made by an agent, although in the custody of a detective officer on a charge of misappropriating the proceeds of sales of his principal's goods, when not induced by threats, promises or deception, are competent against the agent and may be proved by the testimony of the officer to whom they were made.

APPEAL by plaintiffs from a judgment of the Sixth District Court in favor of defendant.

A. Nelson, for appellants.

J. P. Niemann, for respondent.

MCADAM, J. The pleadings in the court below were oral. The complaint was for "conversion," and the answer was "general denial; another action pending; *res adjudicata;* plaintiffs not real party; demand bill; counterclaim."

It was claimed at the trial by the plaintiffs that they intrusted with the defendant for sale on commission a quantity of Turkish cigarettes, and that he had sold them and converted the proceeds to his own use. The defendant, on the other hand, insisted that the cigarettes were sold to him on credit, and that the plaintiffs were indebted to him in the sum of $255, being a 5 per cent. deduction which he contended they agreed to allow him on the gross amount paid by him on his purchases from them.

No question was raised in the court below as to whether trover would lie, and that subject need not, therefore, be considered now.

The defendant introduced in evidence the pleadings in an action brought by him against these plaintiffs in the City Court of New York, wherein it was sought to recover the 5 per cent. aforesaid, and claimed that if the plaintiffs had any cause of action it should have been pleaded as a counterclaim and litigated in that suit, which was pending when this one was commenced. The defendant cites Bartholomay Brewing Co. v. Haley, 16 App. Div. 485, which holds that an action to recover damages for a breach of warranty on the sale of goods is a bar to a subsequent action by the vendor to recover a balance of the purchase price of the goods, upon the theory that the identity of subject-matter and contract required but one adjudication to determine the entire controversy, which ought to be settled in the action in which jurisdiction first attached. In that case both parties conceded the contract of sale and the identity of the goods, and the single dispute was as to whether a warranty was one of the conditions of the contract. Here there is no such concession as to identity of contract or subject-matter. The dealings between the plaintiffs and defendant extended over a series of years. The plaintiffs sought to recover on an arrestable cause of action for moneys misapplied or converted by the defendant as their broker or agent in the course of his employment, while acting in a fiduciary capacity (Consol. Act, § 1304), while the defendant by his action in the

City Court undertook to collect a claim alleged to be due under a special contract to pay him 5 per cent. on the amount paid by him on sales to him by the plaintiffs. Apart from this dissimilarity there is nothing in the pleadings or in the record showing that the different matters were so blended or interwoven that the determination of the City Court action would effectually adjudicate the rights of the parties, and we cannot infer that such result would necessarily follow.

It is not enough that the transactions involved in and giving rise to the two actions are the same (Stowell v. Chamberlain, 60 N. Y. 272), and the bare fact that two causes of action spring out of the same contract does not *ipso facto* render a judgment in one a bar to a suit on the other (Perry v. Dickerson, 85 N. Y. 345), for a judgment in a former suit is a bar to a subsequent action only when the point or issue in question is the same in both. Marsh v. Masterton, 101 N. Y. 401.

If the first action be commenced in a court of record the party sued need not, as a rule, interpose any cause of action he may have as a counterclaim thereto, but may bring an independent action to recover for it. Light v. Redding, 4 E. D. Smith, 285; Halsey v. Carter, 1 Duer, 667; Gillespie v. Torrance, 25 N. Y. 306, 310; Brown v. Gallaudet, 80 id. 413; Ruppert v. Haug, 87 id. 141, 144. The Marine (now City) Court has since the act of 1872 (chap. 429, § 1) been "a court of record to and for all intents and purposes," and, therefore, within the rule as to counterclaims laid down in the cases just cited.

The Code provisions requiring certain counterclaims to be pleaded in actions in Justices' Courts (Code, § 2947) have no application to the City Court.

The defendant, therefore, failed to sustain his plea that there was another action pending for the same cause.

It sufficiently appears from the evidence that the plaintiffs were the real parties in interest and authorized to maintain the action; so there is no merit in the objection that they were not the real parties in interest.

As to the merits. If there were nothing in the case but the issue whether the cigarettes were purchased by the defendant or intrusted to him to be sold on commission, we might affirm the judgment on the conflicting evidence. But certain exceptions taken by the plaintiffs during the trial require consideration.

It appears that prior to bringing suit the plaintiffs caused the defendant's arrest on the charge of misappropriating the proceeds of the sales made, and on the trial of this action they undertook to prove that the defendant had made admissions concerning the nature of his transactions with the plaintiffs, which they deemed material to establish their cause of action. They called Michael J. Rein, an officer connected with the detective bureau, as a witness, and interrogated him as to the subject-matter of the suit. The defendant's counsel obtained leave to examine the witness *voir dire*, and on such examination it appeared that the admissions were made while the defendant was in the custody of the officer and while arraigned in a magistrate's court. The plaintiffs then attempted to resume their examination in chief, but the questions put were objected to and excluded under exception. The defendant seeks now to criticise the form of the questions, but all objection to form must be deemed obviated by the ruling of the justice, in which he said: "I will sustain objections to anything of this character," for it was useless to change the phraseology of the question for the mere purpose of having it excluded when that result was inevitable.

The rule is that where a party to a civil action has made admissions of facts material to the issue in the action, it is always competent for the adverse party to give them in evidence; and it matters not whether the admissions were in writing or by parol, nor when nor to whom they were made. Cook v. Barr, 44 N. Y. 156; Wood's Pr. Ev. 494.

We held in Nasanowitz v. Hanf, 17 Misc. Rep. 157, that where on a previous trial of an action a witness had testified to certain facts, any person present at the time was competent to testify in respect thereto, and that there was no necessity for producing the stenographer who took the notes of the evidence.

But it is claimed by the defendant that different rules apply when the statements are made by a person while in the custody of an officer under a criminal charge or while being arraigned in a criminal court.

There is no warrant for such claim. The term "admission" is usually applied to civil actions, and "confession" to acknowledgments of guilt in criminal prosecutions. Where statements made by a defendant to an officer involve him civilly, they may be received as an admission against interest, even though they might by rejected as a confession in a criminal court. 1 Ph. Ev.

(5th Am. ed., with C. & H.'s notes) star p. 432; and see, also, Tayl. Ev., § 724, from the 8th Eng. ed.; 1 Greenl. Ev., § 193. Many learned jurists have considered confessions as the highest and most satisfactory evidence of guilt. Roscoe's Crim. Ev. (7th ed.) 39.

The circumstances under which the confession is made may affect the value to be given to the evidence, but do not affect its competency when offered as an admission against interest in a purely civil proceeding.

It did not appear that the admission was made under the influence of fear produced by threats, or by promises or deception; and it would have been admissible even in a criminal prosecution. Crim. Code, § 395; Fralich v. People, 65 Barb. 48, 51; Hartung v. People, 4 Park. Rep. 319; O'Brien v. People, 48 Barb. 274, 279, 280. *Prima facie*, as a matter of course, a confession by the prisoner is admissible as evidence against him, and it is for him to show legal grounds for excluding it. Roscoe's Crim. Ev. (7th ed.) 39; Commonwealth v. Sego, 125 Mass. 210, 213. And it is not sufficient to exclude a confession by a prisoner that he was under arrest at the time, or that it was made to the officer in whose custody he was, or in answer to questions put by him, or that it was made under hope or promise of a benefit of a collateral nature. Cox v. People, 80 N. Y. 500.

In People v. Rogers, 18 N. Y. 9, 12, where the prisoner was tried for murder, Judge Denio, writing for the court, said: "The objection to the testimony of the policeman assumes that no admission by a person accused of crime, made to an officer who had him in custody, can be received. It was not pretended that any threats, promises or other inducements had been held out to the prisoner, but the objection was placed upon the ground first mentioned. I have looked carefully into all the cases referred to by the defendant's counsel in support of that position, and many others, and do not find that it has ever been held that the single fact of the prisoner being in custody was sufficient to exclude his declarations, whether made to the officer or to third persons. On the contrary, many of the cases, upon the competency of confessions, show that the prisoner was in custody at the time, and the question generally has been, whether the confession was voluntary, or was influenced by what was said to him by the officer or by others."

It is apparent, therefore, that the rulings by the justice as to the admissibility of the admissions as evidence in a civil action were

stricter than would have been authorized if the statements had been offered as confesssions in a criminal prosecution.

For error in excluding this evidence the judgment must be reversed and a new trial ordered, with costs to the appellants to abide the event.

DALY, P. J., and BISCHOFF, J., concur.

Judgment reversed and new trial ordered, with costs to appellants to abide event.

JACOB BLUM, Respondent, *v.* AMBROSE DALY, Appellant.

(Supreme Court, Appellate Term, January, 1898.)

Goods sold — An offer must be accepted.

Where a vendee alleges that certain of a lot of skirts delivered to him were not those selected by his agent, but offers to buy those which are satisfactory to him, and this offer is declined by the vendor, to whom the goods are subsequently returned, he cannot subsequently recover for those which the vendee offered to take, as an offer, not accepted, is not binding upon either party to a contract.

APPEAL by defendant from a judgment of the Fifth District Court.

D. A. Spellissy, for appellant.

John Bogart, for respondent.

MCADAM, J. The item of the plaintiff's account litigated before the justice was that of March 9, 1897 — "16 skirts, $4.50 each, $72." These were selected by the defendant's agent, Mr. Brennan. When the skirts were received and examined at the defendant's store Brennan insisted that they were not the same goods he ordered.

The evidence shows that the examination disclosed that ten of the skirts were all right, and six much inferior to those selected. The defendant thereupon offered to return the six skirts, and said he was willing to buy the other ten because he liked them, but the plaintiff's son, who managed his father's business, declined

to assent to this, and said that the defendant must send back the whole lot if the goods were unsatisfactory. Acting upon this direction the defendant, some days afterwards, returned the sixteen skirts to the plaintiff.

The justice disallowed the charge for the objectionable six skirts, but gave judgment against the defendant for the other ten, on the theory that by offering to return six and proposing to purchase the other ten skirts he had elected to accept the latter, and in consequence became liable for their purchase price. To hold that the defendant had elected to do anything of the kind presupposes that the plaintiff had given him the option of determining whether he would accept ten or sixteen of the skirts, when such an inference is directly contrary to the fact.

It is unnecessary for us to consider whether there was an acceptance of the entire sixteen skirts by the defendant, for the finding by the justice negatives that; and if the defendant was not bound to accept all he was under no obligation to accept any.

The defendant's proposition to purchase and retain ten of the skirts was not an executed election on his part to accept the ten; it was at most a mere offer, not binding until accepted by the plaintiff. The rule is elementary that both parties must be bound or neither is bound; in other words, there must be mutuality of engagement. Clark on Cont. (Hornbook ed.) 168.

In order to constitute a contract it is essential that there should be a reciprocal assent to a certain and definite proposition. A mere offer not assented to constitutes no contract, for there must not only be a proposal, but an acceptance thereof. So long as a proposal is not acceded to it is binding upon neither party, and may be retracted. Story on Cont., § 378. The parties must assent to the same thing in the same sense, and the proposition must be met by an acceptance which corresponds with it entirely and adequately. 1 Pars. Cont. (6th ed.) 475, 476. There is no evidence that the plaintiff gave any assent to change the contract as originally made; on the contrary he throughout treated the sale as entire and indivisible, and brought this action on that theory.

The justice could not of his own motion make an election for the plaintiff by splitting his indivisible demand without the consent of the parties interested, however equitable that course might seem.

If for any reason the defendant was entitled to return the property he was on the evidence bound to do as he did — return all.

It follows that the judgment must be reversed and a new trial ordered, with costs to the appellant to abide the event.

DALY, P. J., and BISCHOFF, J., concur.

Judgment reversed and new trial ordered, with costs to appellant to abide event.

BENJAMIN SMUSCH, Respondent, *v.* SANDER KOHN, Appellant.

(Supreme Court, Appellate Term, January, 1898.)

Fixtures — Landlord and tenant — Conversion.

Such articles as a glass cabinet partition, brass chandeliers and a showcase, placed in a store by a tenant, are fixtures which may be bought and sold by his successors, and one who buys them from the last tenant of the store, ejected by summary proceedings, may maintain an action for conversion against the landlord upon his locking up the premises and preventing the purchaser of the fixtures from removing them.

APPEAL by defendant from a judgment of the Fifth District Court.

J. Warren Lawton, for appellant.

S. Feuchtwanger, for respondent.

MCADAM, J. The action is in trover to recover for the conversion of one bevel glass cabinet partition, two brass chandeliers and a showcase. The facts are substantially as follows:

The premises No. 1048 Second avenue, in which the property was contained, belong to the defendant. George F. Bolz was a tenant of the premises, and carried on the oyster business there from 1889 till 1892. He had the articles made and put in the premises for his own benefit and purposes and on his own account, without reference to the interests of the freehold. The glass cabinet, as the plaintiff describes it, was an ornamental mahogany partition, containing three bevel glasses and a colored glass on the door.

Bolz on March 16, 1892, sold his lease and the chattels in question to Charles Seipp. On February 18, 1895, the defendant

gave Seipp a new lease of the premises for five years from May 1, 1895. On September 9, 1897, Seipp sold the lease and store fixtures to Frank Schwager, and the latter on October 2, 1897, transferred them to J. Goldsmith.

On October 4, 1897, Goldsmith sold the store fixtures at an auction sale held upon the premises, and the plaintiff became the purchaser thereat. On October 5, 1897, the tenant and undertenant were dispossessed and the defendant took possession of the premises and put a padlock on the door; so that when the plaintiff went for his property he failed to obtain possession of it. Demand was thereupon made on the defendant for the chattels, but he refused to give them up, claiming that they were his own.

The evidence satisfactorily shows that the articles were put in the premises by Bolz and were transferred by him to Seipp, and title thereto passed by the subsequent transfers to the plaintiff prior to the demand upon the defendant for the property, unless, as claimed by the defendant, the renewed lease given by the defendant to Seipp in 1895 made such transfers inoperative. The defendant bases this claim upon Loughran v. Ross, 45 N. Y. 792; Talbot v. Cruger, 81 Hun, 504; affirmed, 151 N. Y. 118; Watriss v. First Nat. Bk., 124 Mass. 571; and McIners v. Estabrook, 134 id. 550; but it will be found that these cases relate to buildings erected by the tenant or to bank vaults and such like permanent and substantial structures put up by him, which became appurtenant to the land, and consequently an incident of the subject-matter rehired as part of the premises and their appurtenances. They do not concern ordinary movable chattels, which retain their distinctive character as personal property, in reference to which a different rule, one much more liberal to the tenants, prevails. Wait's Act. & Def. 368, 372. The Court of Appeals in Lewis v. Ocean N. & P. Co., 125 N. Y. at p. 350, referring to Loughran v. Ross, *supra*, said: "The decision in that case was placed upon quite technical reasoning, supported it is true by some authorities, but it is not one of those cases whose principle should be extended." As the interest of the tenant in land is but temporary, the law generally infers that what he annexes for himself with a view to his own enjoyment during his term, and not to enhance the estate, and which can be detached without material injury to the freehold, may be removed by him. Tifft v. Horton, 53 N. Y. at p. 382. "When the question of removal

of fixtures arises between landlord and tenant the law is now well established, both in England and America, that a tenant may sever and remove all fixtures of a chattel nature erected by him upon the leased premises for the purpose of ornament, domestic convenience, or to carry on a trade." 8 Am. & Eng. Enc. of L. 48, 60; 6 Laws. R. & R. 2899.

It would be dangerous doctrine to hold that the ordinary movable store fixtures of a tenant pass to his landlord by the mere act of renewing the term, unless by express stipulation he reserves the continued right of removing them (see Second Nat. Bk. v. Merrill Co., 34 N. W. Repr. 514; Kerr v. Kingsley, 39 Mich. 150); yet this is practically what we would have to decide in order to reverse this judgment. Such chattels are generally useful to the tenant who puts them in wherever he may remove, so long as he carries on the same trade, and may not be of any use to a succeeding tenant, since he may be of a different trade.

Neither the presumed intention of the parties nor the character of the chattels gives any color whatever to the contention that they were to become the property of the landlord. The brass chandeliers and showcase are regarded as in the category of furniture, and removable in like manner. Lawrence v. Kemp, 1 Duer, 363; Shaw v. Leake, 1 Daly, 487; McKeage v. Hanover Ins. Co., 81 N. Y. 38; Wilson v. Cummings, 4 Misc. Rep. 429. The mahogany partition was part of the tenant's store fixtures introduced into the premises for his own personal benefit, and there is nothing to show that it was permanently annexed to the freehold or that it could not be removed without material injury. These movable chattels being the personal property of the tenant, title thereto passed by the various transfers until it reached and finally vested in the plaintiff, who acquired the immediate right of possession.

The defendant also contends that because the lease made to Seipp, February 18, 1895, contains a clause that "all the improvements, alterations, repairs and additions put upon the said premises by the party of the second part" (the tenant), "shall be left for the benefit of the party of the first part" (the landlord) "at the expiration of the term," etc., the chattels in question became his.

While the terms "improvements and additions" are comprehensive (Lesser v. Rayner, 21 Misc. Rep. 666) they ordinarily refer to changes and additions made to the freehold, and not the

mere introduction of movable chattels brought in by the tenant for his personal use and the convenience of his trade. Besides, the partition and other articles were not put in the premises by Seipp, the lessee named in the renewed lease. They had been purchased by him from Bolz, the preceding tenant, and became his own personal property before that lease was made, and do not fall within the letter or spirit of the special covenant in Seipp's lease that improvements or additions made by him should be left on the premises. Bolz, who put the chattels in, had no agreement with the landlord concerning them, so far as the return discloses, and they cannot, contrary to the fact, be called "improvements or additions" made by Seipp, by virtue of the lease which was made to him.

The chattels were not abandoned to the defendant. The tenant was ejected from the premises by compulsion of the warrant in summary proceedings, and had a reasonable time thereafter within which to move away his personal property before being held to have voluntarily abandoned it. Moore v. Ward, 12 Abb. Pr. 393; Lewis v. Ocean N. & P. Co., 125 N. Y. 341, 352.

As the property claimed formed no part of the realty and the plaintiff was entitled to its possession as personalty, trover in conversion was a proper remedy (Moore v. Ward, *supra*, approved in 125 N. Y. at p. 352; Wilson v. Cummings, *supra;* Thorn v. Sutherland, 123 N. Y. 236), and the refusal to surrender possession of the property to the plaintiff, on demand, was evidence in favor of the plaintiff, as assignee, of the conversion of the chattels. Serat v. Utica, etc., R. R. Co., 102 N. Y. 681.

Whatever dispute arose in regard to the facts was by the finding of the justice resolved in favor of the plaintiff.

The judgment must be affirmed, with costs.

DALY, P. J., and BISCHOFF, J., concur.

Judgment affirmed, with costs.

DENNIS DERMODY, Respondent, *v.* ADDISON B. FLESHER, Appellant.

(Supreme Court, Appellate Term, January, 1898.)

Contract dependent on the satisfaction of a pupil — Capricious dissatisfaction.

Where a person, maintaining a school for instruction in the millinery art, specially contracts with a pupil that, if she is not satisfied with the teaching, materials and in every respect, he will refund the fee which she pays, he constitutes the pupil the sole arbiter of her own satisfaction and must return the fee if she is not satisfied in every respect; and, if it be assumed that the dissatisfaction must not be merely capricious, the finding of a justice of a District Court of the city of New York in favor of the pupil, resolves that question in favor of the assignee of the cause of action of the pupil.

APPEAL by defendant from a judgment of the First District Court.

Wilson, Bennett & Underhill, for appellant.

W. E. Cook, for respondent.

MCADAM, J. The defendant kept a school in which he agreed to instruct in the millinery art any one willing to pay $25, and, according to his advertisement, he guaranteed entire satisfaction. The plaintiff's assignor, Elizabeth C. Meade, joined the school about January 1, 1897, under a special contract with the defendant by which he was to instruct her in the art by the aid of competent teachers and with the very best materials for the purpose, and if she was not satisfied in every respect he agreed to refund the fee of $25, which the plaintiff then and there paid.

After Miss Meade had attended the school for a few days she became dissatisfied with the teaching, the materials and her treatment generally. She complained of these things to Mrs. Flesher, the manager, and subsequently to the defendant, from whom she demanded the return of the $25, according to the agreement. The defendant refused to pay, whereupon Miss Meade transferred her demand to the plaintiff, who brought the present action and at the trial obtained a judgment in his favor for the amount claimed.

The defendant having agreed that the instruction to be given should be satisfactory to the pupil, he constituted her the sole arbiter of her own satisfaction, and he must stand by his contract to return to her the fee of $25 if she was not satisfied in every respect. Johnson v. Bindseil, 15 Daly, 492; 16 id. 232; Gray v. Alabama Nat. Bk., 30 N. Y. St. Repr. 824; Glenny v. Lacy, 16 id. 798; Tyler v. Ames, 6 Lans. 280; Moore v. Goodwin, 43 Hun, 534. If we go further and hold that the dissatisfaction must not be capricious, but substantial and justified by the facts, the finding of the justice, like that of a jury, in favor of the plaintiff resolves that question in his favor. Hummel v. Stern, 15 Misc. Rep. 27.

The defendant urges that the action should not have been brought against him, but against his wife. The evidence sufficiently shows that he conducted the school. He speaks of it in his testimony as his, and gives the number of his pupils. He made the contract with the plaintiff's assignor without disclosing any agency on his part, and led her to believe and act on the belief that the school was his, and it is too late now for him to seriously question his liability as principal contractor.

It is objected that the justice allowed the plaintiff to amend the bill of particulars at the trial. The court clearly possessed the power. Parsons v. Sutton, 66 N. Y. at p. 95. The defendant did not claim that he was in any manner surprised by the amendment, nor was the amendment of a character calculated to surprise him. The bill of particulars was merely amended to conform to evidence of the assignor and her sister which went in without objection; and it is doubtful whether any amendment was necessary. Chadbourne v. Del., etc., R. R. Co., 6 Daly, 215.

The case involved a clear conflict of evidence, and the trial judge, who saw the witnesses and heard them testify, had a better opportunity to judge of their credibility and the value of their testimony than we have by a mere reading of the return; and his findings of fact should be accepted unless error is apparent. We find no reason for disturbing his conclusions.

Judgment affirmed, with costs.

DALY, P. J., concurs.

Judgment affirmed, with costs.

BARUCH KAHN, Respondent, *v.* FREDERICK EISLER, Appellant.

(Supreme Court, Appellate Term, January, 1898.)

Negligence — Collision on the road — Presumption of negligence from the speed of a horse.

Where the proof made in an action brought to recover damages resulting from a collision caused by the alleged negligence of the defendant tends to show that he, at the time of the collision with the wagon of the plaintiff, was driving a spirited horse attached to a light wagon, and was speeding his horse with another horse also drawing a light wagon, there is a presumption that his horse was not under proper control; and hence, a judgment, rendered upon conflicting evidence, in favor of the plaintiff will not be disturbed.

APPEAL by defendant from a judgment of the Third District Court.

H. C. Botty, for appellant.

L. Lowenstein, for respondent.

MCADAM, J. The evidence on which the justice appears to have relied establishes that on April 23, 1897, the plaintiff was driving a Brewster road wagon up the easterly side of Jerome avenue at a moderate rate of speed; that when near One Hundred and Seventy-first street he discovered the defendant coming down the avenue driving a spirited horse before a light road wagon, speeding with another horse drawing a light wagon to the right of defendant; that the defendant's horse was going at the rate of about a mile in three minutes, and was east of the middle of the roadway; that when the defendant's horse was first seen by the plaintiff the latter thought it was a runaway and made every effort to get out of the way, but it came so fast that it collided with his wagon before he had an opportunity to escape. Mr. Skinner, one of the plaintiff's witnesses, described the occurrence as one caused by gross negligence on the part of the defendant; that it looked to him as though there would be a collision, and he shouted to the plaintiff to look out.

As usual in negligence cases the defendant and his witnesses gave a different version of the occurrence from that given by the

plaintiff, throwing the fault upon the plaintiff; but the circumstances were such as to warrant the justice in believing the plaintiff's evidence and finding that the collision was caused wholly by the negligence of the defendant.

One thing is certain. The defendant was driving at such a high rate of speed, with his mind on the horse he was speeding, that it is doubtful whether he had his horse under such control as to avoid doing damage to others lawfully using the highway; and it is highly probable that the accident occurred from this cause.

The question of fact involved was decided on conflicting evidence. That given by the plaintiff on the one hand and by the defendant on the other are irreconcilable. The justice had the witnesses before him, observed their appearance and manner of testifying, and had ample opportunity of forming an accurate judgment as to the value of the evidence given. There is nothing in the case that warrants us in holding that he erred in giving credence to the plaintiff's version of the facts, and as no point is made as to the amount of the recovery the judgment must be affirmed, with costs.

DALY, P. J., concurs.

Judgment affirmed, with costs.

FRIEDA SZERLIP, Appellant, *v.* FRANZ BAIER, Respondent.

(Supreme Court, Appellate Term, January, 1898.)

District Courts — Power to open default after failure to set aside service of the summons — Terms.

Under the Consolidation Act (Laws 1882, chap. 410, § 1367, as amended by Laws of 1896, chap. 748), a justice of a District Court of the city of New York has power, after the reversal of an order vacating a judgment for an alleged failure to serve the defendant with the summons, to open the default and allow him to plead; but where it appears that his motion to vacate the judgment subjected the plaintiff to costs which have been taxed and entered, the payment of these costs should be made a condition of opening the default.

APPEAL by plaintiff from an order opening default made by the justice presiding in the Fifth District Court.

A. B. Schleimer, for appellant.

A. H. Berrick, for respondent.

MCADAM, J. The plaintiff recovered judgment against the defendant by default in the Fifth District Court, October 3, 1896. The defendant moved to set the judgment aside upon the ground that the summons had not been served upon him, and that the court in consequence had no jurisdiction. The justice ordered a reference as to the facts, and upon the coming in of the report the evidence was treated as the depositions of the witnesses, and after argument the justice granted the motion and vacated the judgment, with costs. Upon appeal the order was reversed, with costs. 21 Misc. Rep. 331. These costs were taxed by the clerk October 21, 1897, at $73, for which the plaintiff entered judgment.

The defendant thereafter moved to set aside the taxation and judgment, and by an order entered November 24, 1897, the motion was denied, with $10 costs. 21 Misc. Rep. 692.

After the reversal of the order setting aside the judgment for nonservice of process the defendant moved to open the judgment so that he might be permitted to come in and defend on the merits. The motion was granted November 12, 1897, on payment by defendant to plaintiff of $10 costs. From this order the plaintiff has taken the present appeal.

Section 1367 of the Consolidation Act, applicable to District Courts (as amended by Laws 1896, chap. 748), provides that " the court, or any justice holding the same, may at any time, upon motion made upon such notice as the justice may direct, open any default, and set aside, vacate or modify any judgment entered thereon, and set the cause down for pleading, hearing or trial, as the case may require, upon such terms and conditions as the court or justice may deem proper." Under this provision the justice in his discretion had power to make the order appealed from, and we find no abuse of that discretion except in reference to the terms imposed.

The defendant having previously moved to set aside the same judgment, and by his motion put the plaintiff to an expense of

$73, the payment of this sum ought to have been imposed as one of the conditions of opening the judgment.

The order appealed from will, therefore, be modified by directing that the motion to open the judgment be granted, and the defendant allowed to interpose an answer on the merits, on payment by the defendant to plaintiff, within five days after the service of the order to be entered hereon, of $10 motion costs and the $73 represented by the judgment of October 21, 1897; that upon such payment a trial be had at a time to be specified in the order; that said judgment stand as security; and that if said terms are not complied with within the time specified the said motion be denied.

The payment of the $10 costs imposed by the order of the Appellate Term, November 24, 1897, is not made a condition of opening the judgment, for the reason that they were awarded after the order appealed from was made, and the matter could not, therefore, have been considered by the justice below in making his order.

As modified the order appealed from will be affirmed, without costs.

DALY, P. J., and BISCHOFF, J., concur.

Order affirmed, without costs.

HENRY F. KOESTER, Respondent, *v.* PHILIP A. DECKER, Appellant.

(Supreme Court, Appellate Term, January, 1898.)

Negligence — Law of the road — Collision.

Where two vehicles are approaching each other on streets which meet at a right angle, neither has the right of way; but where one driver signals to the other that he will continue his present course, he has a right, in the absence of any indications to the contrary, to expect that his signal will be obeyed, and where a failure to obey results from the presence of a concealed load which prevents the driver signalled from properly controlling his team, a verdict against his employer will be sustained.

APPEAL from a judgment rendered by the justice of the Seventh Judicial District Court in favor of the plaintiff.

Action for negligence.

William Doll, for respondent.

Sol. A. Hyman, for appellant.

BISCHOFF, J. The plaintiff's carriage, a physician's light buggy, came into collision with the defendant's delivery wagon in a manner which was not in fact the subject of dispute by the different witnesses, and if, as is claimed, the plaintiff's testimony was uncertain as to the exact place of the accident, the uncertainty appears to have been brought about only through the confusing method of cross-examination which was adopted.

The collision actually happened on Avenue A, at a point on the westerly side of that avenue between Seventy-sixth and Seventy-seventh streets, the plaintiff's direction having been originally northwardly along the avenue on its easterly or right-hand side, but, in order to escape injury, so far as might be, from impact with the defendant's wagon, which was being driven westwardly along Seventy-sixth street and first seen when the plaintiff reached the corner of that street, his course was changed toward his left-hand side and the continued progress of the vehicles resulted in their coming together when north of the crossing.

From the evidence as to the circumstances surrounding the approach of both these wagons towards the intersection of Seventy-sixth street with the avenue, at which point the question of the due exercise of care arose, we think the justice could properly find that the accident was brought about through the negligence of the defendant's servant without a failure of reasonable prudence upon the part of the plaintiff, or of the servant who was driving his carriage.

The manner in which these vehicles approached the intersection of the street with the avenue caused it to become necessary for one to give place for the other's passage, since their respective courses at right angles, if maintained, must have resulted in their coming together, and, conceiving that he had the better right of way, the plaintiff's driver signaled to the defendant's driver that he would pass in front, continuing his course, but the latter did not lessen his speed in obedience to this signal nor change his direction in any way, and the plaintiff's driver then turned his course to the left in order to avoid the collision which, despite his efforts, resulted as detailed.

It was claimed for the defendant that his wagon could not have been brought to a stop or its speed sufficiently lessened, after the plaintiff's intention became apparent, because it contained a heavy load consisting of tubs of meat, weighing 1,500 pounds, but, so far as was apparent to the plaintiff, this vehicle was an ordinary-covered grocery wagon, drawn by one horse and readily to be controlled within the space available, and the fault was wholly that of the defendant's driver, if, by reason of this concealed load, he was unable to properly control the wagon when approaching the crossing of a much traveled thoroughfare.

That the plaintiff's driver did not fail to act as a reasonably prudent person when electing to pass in front of the defendant's wagon, under the circumstance, was, we think, a legitimate finding of fact from the evidence, since, while there is no question that the collision would not have occurred had the defendant's driver been given the right of way, the plaintiff's servant could well be justified in his assumption that his signal that he himself intended to maintain his course would be observed and acted upon, and, so far as was apparent to him, the situation was not one calling for any greater caution upon his part, such as might have been expected were it apparent that the approaching wagon was under less perfect control than was his own.

No rule of law required that both the wagons should be brought to a stop; one or the other was entitled to the right of passage, and the plaintiff's driver having signified his intention to pass, without having had any reason to believe that the defendant's driver would dispute the right of way thus indicated, he was not chargeable with negligence as contributing to the injury which was then brought about solely because the defendant's servant failed to exercise the amount of care which was reasonably to be expected from him.

The defendant's driver testified that no signal was given and that, from the fact that the plaintiff turned his course to the left, he assumed that the latter intended to drive into Seventy-sixth street and away from him, but the justice was quite authorized to credit the testimony of the plaintiff's servant that he did signal, and that his change of course took place only after that signal was obviously disregarded and when the certainty of a collision thus became apparent.

The fact that the plaintiff, who was sitting beside his driver at

the time, thought that the action of the driver, in swerving to the left, was for the purpose of avoiding contact with a child upon the street, does not affect the force of this driver's own testimony that he was then trying to avert a collision with the defendant's wagon, although it is true, as the appellant contends, that the servant's testimony does not contain an allusion to any child's presence.

It is not to be assumed that the plaintiff knew what was passing in his servant's mind, and it is entirely probable that, while such servant's attention was directed only to the approaching wagon, the plaintiff himself may have had in view a child whose position upon the street was rendered the safer by the actual change of course which took place.

No question is raised with regard to the measure or evidence of the plaintiff's damage, and as to the matter of responsibility for the accident itself the conclusion reached by the justice is to be sustained.

Judgment affirmed, with costs.

DALY, P. J., and MCADAM, J., concur.

Judgment affirmed, with costs.

DIETRICH MERSCHENDORF, Respondent, *v.* PAUL KOCH, Appellant.

(Supreme Court, Appellate Term, January, 1898.)

Bills and notes — Consideration — Storage certificates for whiskey deliverable in the future — Interested witness.

A note, given in consideration of the delivery to the maker of certain certificates which state that a quantity of whiskey is kept by the payee on storage, subject to the order of the maker, upon the payment of the purchase price, a government tax and certain charges, has a sufficient consideration; and the unsupported testimony of the maker, that the maturity of the note was to be deferred until he demanded possession of the whiskey, need not be accepted by the court as he is an interested party.

APPEAL from a judgment rendered by the justice of the First Judicial District Court in favor of the plaintiff. Action upon a promissory note.

Leon Kronfeld, for respondent.

W. W. Culver, for appellant.

BISCHOFF, J. The note in suit was given to the plaintiff by the defendant in return for the delivery to him of certain certificates which expressed the fact that a quantity of whiskey was kept by the plaintiff, on storage, to the defendant's order, the whiskey to be delivered upon payment by the holder of the certificate of the stated purchase price and the tax imposed by the government, together with certain other charges.

The defendant set up an affirmative defense of an alleged oral agreement, contemporaneous with the delivery of the note, whereby the maturity of the obligation was deferred to his demand for possession of the whiskey, and it was claimed that the defendant had never demanded such possession. In support of this defense the defendant alone gave testimony, and upon this appeal it is contended that the justice should have found favorably to the defense upon this evidence because not expressly contradicted, or that, in any event, judgment should have been rendered for the defendant upon the ground that there was an absence of consideration for the note.

The presence of consideration amply appears, however, from the fact that the plaintiff bound himself to keep the stated quantity of whiskey ready for delivery upon the defendant's demand, and it is reasonably to be inferred from the plaintiff's evidence that the note in suit was given to secure the defendant's payment, under the contract, before the date of maturity.

That delivery of the whiskey was to precede the payment of the price was a proposition opposed to the terms of the agreement, as expressed in the certificate, and the only evidence that such was the condition of payment is found in the uncorroborated testimony of the defendant himself, which testimony, if otherwise available, being that of an interested witness, was by no means conclusive upon the justice sitting as trier of the fact. Levy v. Yazbeck, 22 Misc. Rep. 136.

The judgment must be affirmed, with costs.

DALY, P. J., and MCADAM, J., concur.

Judgment affirmed, with costs.

FREDERICK FEIST, Appellant, *v.* FREDERICK A. PRINCE et al., Respondents.

(Supreme Court, Appellate Term, January, 1898.)

Conversion — Lawful possession of the defendants under a bill of sale.

Proof, made in an action of conversion, that on the day before the plaintiff delivered goods, sold absolutely to a customer, the latter, in consideration of a prior indebtedness to the defendants, executed to them a bill of sale of all his stock, incuding the goods in question, not accompanied by proof of any subsequent act of rescission upon the part of the customer, is insufficient to support the action, as the possession of the defendants has been lawfully acquired.

APPEAL from a judgment rendered by the justice of the First Judicial District Court in favor of the defendants, in an action for the conversion of personal property.

S. D. Sewards, for appellant.

Coffin & Smith, for respondents.

BISCHOFF, J. The plaintiff sued upon an assigned claim of the firm of S. & B. Lederer, manufacturers of jewelry, for the alleged conversion by the defendants of certain articles of jewelry sold and delivered to one Horton, through whom the defendants obtained possession of such goods under the following circumstances:

Horton, who was engaged in the jewelry trade and a regular customer of the Lederers, ordered the articles in suit from them about the beginning of the month of January, 1896, and on the 22d of that month the goods were shipped from the Lederer's factory to their office in this city for delivery to him under an absolute sale made upon his own credit.

Actual delivery to Horton took place at the latter's place of business on the 24th day of January, but on the 23d he had executed and delivered to the defendants a bill of sale of "all and singular the stock and jewelry and merchandise contained in and belonging to" his jewelry business. Formal transfer of the business occurred on the 24th, and the jewelry in question was left by

Horton in the defendants' custody, together with the other stock in trade.

Horton testified, it is true, that he had stated to the defendant Mooney that these goods were not within the sale to the defendants and were to be returned to the Lederers, but this was directly contradicted by Mooney, and the fact has been found favorably to the defendants upon the testimony of one interested witness against that of another. Horton had a direct interest in the result, represented by the purchase price of the goods for which, should the plaintiff fail to recover, he remained indebted to the Lederers, and his testimony was not entitled to the greater credit, on the score of interest, as the appellant claims.

The terms of the bill of sale were broad enough to cover goods ordered in the course of the jewelry business, and of which delivery was to be expected, and Horton did not rescind his purchase from the Lederers by any overt act; on the contrary, his act of leaving the goods in the possession of the defendants, instead of returning them to the sellers, was more consistent with his confirmation of the purchase, and the justice could well draw the inference, in further support of Mooney's testimony, that no rescission of the transaction with the Lederers had taken place.

Thus, the defendants' possession as against the Lederers was lawful, and conversion was not to be predicated upon their refusal to deliver up the goods, which had come rightfully into the hands of Horton, their vendor, unless the Lederers were entitled to disaffirm the sale to Horton and to demand the goods from his vendees.

It is quite apparent that the sale of these goods to Horton by the Lederers was an absolute one, and there was no proof of any fraud in inducing that sale; nor was there direct evidence of any intent to defraud, and, if, as the appellant contends, the justice might have inferred a fraudulent intent upon Horton's part from the fact that he had delivered the goods at once to another of his creditors, the inference was by no means irresistible, and the justice properly refused to draw it from the circumstances, if, after hearing and observing the witnesses, he was impressed, as we must assume that he was, with the fact that the transaction between Horton and the defendants was actually an honest one.

Upon the facts which the justice has found, and which he was well authorized to find from the evidence, therefore, the Lederers

had no right of demand for possession from Horton, and this action for conversion against these defendants who succeeded to his possession necessarily failed.

While Horton's bill of sale and the transfer of his business to the defendants were made only in discharge of a prior indebtedness, and so might not suffice as evidence of title, as against a party possessing the equities of a defrauded seller of the goods, the question of consideration does not arise here, since the sale to Horton by the Lederers was not fraudulent according to the facts as found, and the defendants' possession was, with regard to the Lederers' rights, fully as lawful as was Horton's possession, and such possession could not be disturbed.

Whether or not these articles actually passed to the defendants under their bill of sale from Horton is, however, a question, the decision of which in accordance with the respondents' contention is not essential to the affirmance of the judgment rendered, for, if the original purchase by Horton was neither rescinded by him nor rescindable by the Lederers, the defendants' right to possession could be questioned, at most, by Horton only, and was not open to dispute either by the Lederers or their assignee, the appellant. Judgment affirmed, with costs.

DALY, P. J., and MCADAM, J., concur.

Judgment affirmed, with costs.

MICHAEL MURPHY, Appellant, *v.* THE KNICKERBOCKER ICE CO., Respondent.

(Supreme Court, Appellate Term, January, 1898.)

Money paid by mistake — Failure to prove short weight in ice sold.

Where a retail and wholesale dealers in ice transact business upon the basis of a weighmaster's card, issued by the wholesale dealers, showing the weight of the wagon of the retail dealer, which weight was deducted from the total weight of the load, the latter cannot recover, as for moneys paid under an alleged mistake, upon mere proof that, after three months' use and dealings, the wagon weighed thirty pounds more than the weighmaster's card showed when made out, as, if the plaintiff claims that the weight was wrong, he must

prove that it was incorrect when originally taken, and stated on the card, by the weighmaster.

APPEAL from a judgment rendered by the justice of the Ninth Judicial District Court in favor of the defendant, in an action brought for the return of money paid under an alleged mistake.

Robt. J. Robeson, for appellant.

Charles K. Carpenter, for respondent.

BISCHOFF, J. The plaintiff, a retail ice dealer, purchased ice from the defendant during the period from April to August, 1896, delivery to him having been made each day by loading his wagon, which was then weighed, as laden, and the amount of the purchase price was reached by deducting from this total weight the weight of the wagon.

The claim in suit was based upon an alleged overpayment by the plaintiff, daily, during this time, resulting from error with regard to the weight of this wagon, whereby, it was contended, he was charged for about 400 pounds more ice than he received, upon each delivery.

According to his testimony, the defendant's weighmaster had continuously taken the weight of the wagon to be 2,800 pounds, whereas it actually weighed 3,200 or 3,230 pounds, but from evidence given in behalf of the defendant, it appeared that the plaintiff had been credited throughout with the weight of 3,200 or 3,230 pounds, except in one instance, when the mistake was immediately corrected.

There is nothing in the record which should cause us to disapprove the justice's acceptance of the defendant's evidence upon this conflict of fact, and the judgment, so far as it concludes upon the alleged discrepancy of 400 pounds, should not be disturbed.

In the course of dealing between the defendant and its customers, as existing and as observed, the weights of the customers' respective wagons were read by the weighmaster from a card and the price payable by each customer, upon each loading of his wagon, was fixed and paid accordingly.

The wagons were actually weighed by one of the defendant's agents, from time to time, and the weights were placed upon the weighmaster's card, which was corrected if a reweighing called

for correction, and these weights, as appearing on the card, were used as the basis of the dealings between the parties upon each occasion.

According to the card, the weight of the plaintiff's wagon was placed at 3,200 pounds during the period between April 1st and June 29th, but on the last-named date it was reweighed by the defendant and the weight fixed at 3,230 pounds, from which fact the plaintiff argues that he should have been at least awarded judgment for the amount of a daily overpayment for thirty pounds of ice, during the time when the weight of his wagon had been stated at 3,200 pounds.

We think it was quite proper for the justice to find against this contention upon the evidence.

It was reasonably to be inferred that the defendant's custom of reweighing the same wagon, from time to time, was for the purpose of correcting slight differences in weight, which might be brought about through the continued use of the wagon and through the action of the elements, and it was quite permissible to the justice to find that the weight of 3,200 pounds was correct when the wagon was weighed.

The parties dealt upon the basis of the weights appearing on the card and the plaintiff made his payments, in each instance, for ice actually delivered to him upon that basis, without insisting that his wagon be reweighed; therefore, his payment was to be viewed as made in substantial compliance with his part of the transaction, and certainly there was no mutual mistake, since the defendant claimed throughout that the sale was governed by the weights fixed by the card, and if it were assumed that such weights were inexact, as a matter of fact, it was for the plaintiff to prove that the weight of 3,200 pounds was incorrect when taken, and this he has not done.

The judgment should be affirmed, with costs.

DALY, P. J., and MCADAM, J., concur.

Judgment affirmed, with costs.

SUSIE SHAFER, Respondent, *v.* THE UNITED BROTHERHOOD OF CARPENTERS, LOCAL UNION No. 64, Appellant.

(Supreme Court, Appellate Term, January, 1898.)

Benefit societies — By-law requiring a notice of arrearages — Insufficient verbal notice.

Where the by-laws of a benefit society provide that a member indebted for two months' dues shall be notified by the financial secretary, that when a member owes three months' dues he shall be considered in arrears, and that he will not be eligible to benefits until three months after all arrearages are paid, the company cannot successfully resist a recovery upon a policy whose arrearages for three months were paid by the insured ten days before his death, unless it proves that the financial secretary notified him in writing, when his dues were two months in arrears, of that fact; nor, assuming that a verbal notification would be sufficient, is such a notification made out by proof that the financial secretary told him, about the time when he was two months in arrears, that he had better "square his account."

APPEAL from a judgment rendered by the justice of the Eighth Judicial District Court in favor of the plaintiff.

Action brought for death benefits by widow of member of benefit association.

John A. Payne, for respondent.

Sidney J. Cowen, for appellant.

BISCHOFF, J. The defense to the plaintiff's action, brought to recover the amount of benefit accruing under the defendant's by-laws upon the death of her husband, a member, was based upon the provisions of one of the by-laws, expressed as follows: "Any member indebted to his local union for any sum equal to two months' dues shall be notified by the financial secretary, and when owing a sum equal to three months' dues shall be considered in arrears and will not be eligible to any benefits until three months after all the arrearages are paid in full."

The plaintiff's husband became indebted to his local union for three months' dues, and, while the arrearage was paid in full some ten days before his death, his status, when he died, would not

have been that of a member in good standing, since the rule, as quoted, operated to reinstate him only after the expiration of three months from the date of the payment, unless the failure of the defendant's secretary to notify the member when an indebtedness of two months' dues existed had the effect of suspending the operation of the rule.

Waiving any other questions which might arise in the case, the appellant contends that the plaintiff's recovery was to be precluded by virtue of the terms of this by-law, taken with the conceded state of the member's account with the defendant, but, as we construe the contract, as evidenced by the by-laws, the result reached by the justice is to be sustained.

It is well settled that the words employed in by-laws, such as those governing the rights of these parties, are to be liberally construed in favor of the beneficiary, so far as may be necessary to a determination of what was understood by the latter to be their meaning, and we are led irresistibly to the conclusion that the notice provided for by this particular by-law, as reasonably interpreted, was to precede the imposition of the penalty for suffering the indebtedness to continue.

To say that the arrearage of three months' dues deprived the member of benefits, at once and at all events, and that the notice had exclusive application to the two months' indebtedness alone, would be, in effect, to withhold all meaning from the provision calling for the notice, since no penalty attached when the member was two months in arrears, and a notice of the fact would have no significance and would be entirely unnecessary, if intended to operate upon that situation alone. The only office of such a notice was, clearly, to apprise the member of some significant fact, and it is solely by viewing the notice as an intended warning that meaning can possibly be given to the by-law in its entirety.

It was shown, directly, that no written notice of his two months' indebtedness was sent to the plaintiff's husband, and if it be said that an oral notification was permissible as a compliance with the by-law, there was evidence from which the justice could have found that none such was properly given.

The defendant attempted to prove by the testimony of the witness Lounsbery, who had acted as its "financial secretary" during the period in question, that a verbal notice had been given to the

deceased by the witness, personally, at the proper time, but the only notice thus shown, at about the time when the deceased was two months in arrears, was contained in the "financial secretary's" bare statement to him that he had better "square his account."

This certainly was not such a notice of the facts of the indebtedness as the by-laws contemplated, and it would appear, also, from the evidence that the words used by the witness were not well to be taken as an official expression, but were employed in the course of a friendly conversation and by way of advice.

It follows that the judgment, so far as it is assailed upon this appeal, should not be disturbed. Judgment affirmed, with costs.

DALY, P. J., and MCADAM, J., concur.

Judgment affirmed, with costs.

CARL F. RANDRUP, Respondent, *v.* HENRIETTA SCHROEDER, Appellant.

(Supreme Court, Appellate Term, January, 1898.)

Brokers — Commissions — Waiver of limitation of order of sale of houses — Attempt to defraud broker.

Where an owner, who has contracted with a real estate broker to sell her houses in a particular order, subsequently, by her husband and agent, agrees, that if the broker sells any one of the houses to a particular purchaser with whom he had been negotiating, he shall have commissions, the original limitation as to the order of sale must be deemed to have been waived; and proof that the broker subsequently sold one of the houses to the purchaser in question, although the title, in order to defraud the broker of his commissions, was taken in the name of a third person, entitles the broker to recover commissions of the owner.

APPEAL from a judgment rendered by the justice of the Tenth Judicial District Court in favor of the plaintiff.

Action for broker's commissions..

Samuel Fleischman, for appellant.

Ira G. Darrin, for respondent.

BISCHOFF, J. A judgment for the plaintiff in this action was reversed by this court upon the ground that there was not sufficient proof that he was the procuring cause of the sale of the premises in question, No. 1982 Bathgate avenue, although the purchaser, Wittiger, was originally introduced by him, because his employment, so far as then appeared from his own testimony, was limited to procuring a purchaser for that house only after the adjoining houses, owned by the defendant, had been sold (Randrup v. Schroeder, 21 Misc. Rep. 52), but upon the new trial which was ordered, additional evidence, quite sufficient to support the judgment now appealed from, was made to appear.

While, when plaintiff was first employed as broker, the defendant's desire was that a purchaser of the houses other than No. 1982 should be procured before that house was to be sold, it now appears that Schroeder, the defendant's husband, and exclusive representative, told the plaintiff, after the introduction of Wittiger, that if any one of the houses was sold to that individual commissions would be paid him upon such sale. Plaintiff, before this, had exerted his influence upon Wittiger with respect to all the houses, and there was to be implied from this promise by the defendant a ratification or adoption of the plaintiff's acts in thus endeavoring to induce a sale of the properties in an order other than the order of disposal originally intended, and an abandonment of the limitation as to such order, if, indeed, in view of this evidence, the limitation was meant to apply to the scope of the employment.

Furthermore, Wetterer, the nominal purchaser of record upon the transaction which was finally concluded, testified to an admission by Schroeder that Wittiger's name was to be omitted from this transaction, as recorded, in order that payment of the plaintiff's commissions might be thereby avoided.

Upon the first trial Wetterer's testimony went only to a similar admission by Wittiger, but the explanation of this omission, which applies also to other defects in the evidence passed upon when the first appeal was heard by this court, is found in the fact that the action, as against this defendant, was determined solely upon the testimony taken in an action by the plaintiff against Wittiger for commissions alleged to have become due from the latter in this same transaction, the plaintiff having acted openly in behalf of both parties.

By stipulation, that testimony alone was submitted to the justice when this case was first tried, and its manifest insufficiency, which necessitated our reversal of the judgment then rendered, was due to the fact that the nature of the requisite proof differed in the particular actions.

The evidence now applied was thoroughly credible, although contradicted, and it was quite proper for the justice below to base his decision upon it, if he saw fit, thereby resolving the conflict of fact in favor of the plaintiff.

It has been found that the colorable sale to Wetterer was actually a sale to Wittiger, and this was a circumstance which, taken with the testimony of Schroeder's admission, would give support to the evidence given to show that the plaintiff was recognized as the procuring cause of the sale, in the course of his employment, and established the fact that the transaction was not completed through the defendant's own efforts in good faith, but that there was a collusive attempt to obtain the benefit of the broker's services without making the agreed compensation.

The plaintiff's letter to Wittiger, which, upon the last appeal, appeared to disclose bad faith towards the defendant upon the plaintiff's part (containing, as it did, a statement that the writer knew of Wittiger's over-valuation of the lots offered in exchange for the defendant's property and an intimation that the defendant would not be informed of the facts), was satisfactorily explained upon this trial.

If the plaintiff was responsible for the sentiments expressed in the communication, which was written and forwarded, without his perusal, by a clerk in his employ, it appears that he did in fact act honestly towards the defendant in the matter, since the latter was thoroughly made aware of Wittiger's over-valuation of his property and the plaintiff in no way attempted to deceive her or her agent, but discussed the situation fully and openly with the latter. Judgment affirmed, with costs.

DALY, P. J., and MCADAM, J., concur.

Judgment affirmed, with costs.

ELIZABETH C. TAYLOR, Plaintiff, *v.* CHARLES WRIGHT, Defendant.

(Supreme Court, Albany Special Term, January, 1898.)

Trespass — Plea of title in Justice's Court — New trial in Supreme Court — Costs.

Where an action for trespass, begun in Justice's Court, is there discontinued upon a plea of title and the complaint, in a subsequent action for the same trespass brought in the Supreme Court, is dismissed because the evidence showed the plaintiff to be out of possession, a defendant, who has failed to procure a certificate that the title to real property came in question on the trial in the Supreme Court, cannot, on a motion to enter judgment, be heard to insist that, within the meaning of Code of Civil Procedure, § 3235, there has been no "trial of an issue of fact" and that he is entitled to costs as of course, as the statute itself fixes the costs; and the question, whether there has been a trial of an issue of fact, can properly be considered only upon the taxation or, by the court, upon a retaxation of the costs.

MOTION by defendant for leave to enter judgment with costs.

A. B. Coons, for plaintiff.

Wm. C. Lamont, for defendant.

CHESTER, J. This action was originally commenced in Justice's Court to recover damages for an alleged trespass. The defendant interposed a plea of title, whereupon the action was discontinued in the Justice's Court and a new action for the same cause commenced in this court. The plaintiff alleged in her complaint that she was the owner and in possession of the lands upon which she claimed the trespass had been committed by the defendant. This was denied in the answer. Upon the trial the defendant drew out the fact upon the cross-examination of the plaintiff that she had leased the lands in question, and that at the time of the alleged trespass they were in possession of her tenant under such lease. This lease was put in evidence by the defendant before the plaintiff rested.

At the close of plaintiff's case the defendant moved to dismiss the complaint on the ground that the proof showed that the plaintiff was not in possession of the premises at the time of the alleged trespass, and, therefore, could not maintain the action, and the

motion was granted. Defendant's counsel then asked that defendant have judgment for costs in this court, and the justice stated that the question of costs should be hereafter determined by him pursuant to section 3235 of the Code of Civil Procedure.

The defendant now makes this motion at Special Term for leave to enter judgment against the plaintiff which shall include his costs in the Supreme Court.

The section of the Code of Civil Procedure above referred to provides that "where an action brought before a justice of the peace * * * has been discontinued, as prescribed by law, upon the delivery of an answer, showing that title to real property will come in question; and a new action, for the same cause, has been commenced in the proper court; the party in whose favor final judgment is rendered in the new action is entitled to costs; except that, where final judgment is rendered therein, in favor of the defendant, upon the trial of an issue of fact, the plaintiff is entitled to costs, unless it is certified that the title to real property came in question on the trial." § 3225, Code Civ. Pro.

The only significance of the statement made by the trial justice above mentioned, with reference to costs, was that if the right to costs in the action depended upon the giving or withholding the certificate mentioned in the section, that question should be thereafter determined, for if the right to costs did not depend on this, they were governed by law, and the court had nothing to do with the matter in the first instance. Code Civ. Pro., §§ 3228, 3229, 3235.

The defendant has not moved for a certificate that the title to real estate came in question on the trial, and on the argument of this motion disclaimed any desire for such a certificate, but insisted that there had been no trial of an issue of fact within the meaning of that term as used in the exception contained in section 3235 and, therefore, that he is entitled to costs, of course.

If he is right in this position this motion must fail — for the court has nothing to do with granting or withholding costs to which a party is entitled of course, under the law. The defendant's right to judgment dismissing the complaint is complete without the intervention of this motion, and if he is entitled to costs of course, as he claims, there remains simply the matter of taxation before the clerk.

This being so, I should not assume to determine on this mo-

tion whether or not there has been a trial of an issue of fact. That question will more properly come up for decision on a motion of the aggrieved party for retaxation, if the clerk allows costs to which a party is not lawfully entitled.

The motion is denied, but, as the defendant may have been led into making it by the statement made by the court at the close of the trial, I think the denial should be without costs.

Motion denied, without costs.

CHARLES S. BRANDOW, Plaintiff, *v.* JESSE O. VROMAN et al., Defendants.

(Supreme Court, Albany Special Term, January, 1898.)

1. **Foreclosure — Failure to serve summons within sixty days — Invalidity of lis pendens.**

   The failure of the plaintiff to serve the summons in an action relating to real property within sixty days after the filing of the lis pendens, as required by Code of Civil Procedure, § 1670, does not invalidate the service of the summons, if actually made thereafter, but merely nullifies the lis pendens on file.

2. **Same — Parties — Failure to serve a mortgagor whose property was in the hands of a receiver.**

   An order to publish the summons is required by Code of Civil Procedure, § 439, to be founded upon a verified complaint, but where the property of the mortgagor is in the hands of a receiver, who is a party to the action, the mortgagor is a proper but not a necessary party; and hence second mortgagees of the same premises cannot procure the vacation of an order to serve the mortgagor by publication upon proof that the complaint was not verified, as the defect cannot affect the title.

MOTION to set aside service of summons in an action of foreclosure.

Eugene E. Howe (J. S. Frost, of counsel), for motion.

A. C. Cowles (Josiah C. Tallmadge, of counsel), opposed.

CHESTER, J. This action is brought for the foreclosure of a mortgage made by the defendant Jesse O. Vroman to the plaintiff. Before the commencement of the action a receiver of Vroman's property was appointed and such receiver is a party defendant. The defendants William W. and Josiah Zelie, as executors, are the holders of a second mortgage upon the premises covered by the mortgage sought to be foreclosed. The complaint and a notice of the pendency of the action were filed in the clerk's office June 5, 1897. The summons was personally served upon the defendant Josiah Zelie, as executor, August 18, 1897, and on the defendant William W. Zelie, as executor, August 25, 1897, and also on other defendants more than sixty days after June 5, 1897. The plaintiff has procured an order to serve the summons upon the defendant Jesse O. Vroman by publication on the ground that he was not a resident of the state, and such publication was commenced on the 5th day of August, 1897.

The defendants Zelie, as executors, now appear specially and move to set aside the service of the summons upon them on the ground that it was not personally served on them or on any of the defendants within sixty days from the date of filing the notice of pendency of the action, and that such service by publication was not commenced within such sixty days, as required by section 1670 of the Code of Civil Procedure. They also move to vacate the order of publication upon the ground that it was not founded upon a verified complaint, as required by section 439 of the Code of Civil Procedure.

It is insisted in support of the first branch of this motion that because of the failure to serve the summons either personally or by publication within the sixty days required by said section 1670, the court has no jurisdiction of the defendants Zelie. I think, however, that this view cannot be sustained, and that the only effect of the failure to serve the summons within the sixty days after filing notice of pendency of the action is that the notice so filed loses whatever force or effect it otherwise would have had. The jurisdiction of the court over the defendants making this motion was complete when the summons was personally served upon them and as to them the action was commenced at that time. Code Civ. Pro., § 416. The failure to serve the summons within the sixty days required by section 1670 does not affect the jurisdiction, but the *lis pendens*.

While the latter has lost its force and effect by reason of the failure to serve the summons within sixty days, there is nothing in the way of filing a new notice, and the plaintiff will be required, of course, at least twenty days before final judgment, to file such notice in order to entitle him to judgment. Code Civ. Pro., § 1631. The first branch of the motion must, therefore, fail.

As to the other branch of the motion it may be conceded that there was no legal verification of the complaint and that the order to publish the summons was not founded upon a verified complaint as required by section 439 of the Code of Civil Procedure, as is asserted by the defendants Zelie in support of this motion, yet I think they are not in a position to take advantage of this defect. While the defendant Vroman is the mortgagor he is not the owner of the equity of redemption, but the receiver of his property is such owner. Vroman was, therefore, a proper but not a necessary defendant. The receiver of Vroman being the owner of the equity of redemption and a party defendant, the presence of Vroman is not essential to a complete foreclosure of such equity. Nor will the interest of the defendants Zelie to have a marketable title offered on the sale be prejudiced by the failure to cure a defect which does not impair such title. For these reasons I think they have no standing as the owners of the second mortgage to complain of the defective service of the summons on Vroman.

The motion is denied, with costs.

Motion denied, with costs.

THE NATIONAL LEAD CO., Plaintiff, *v.* CHARLES H. DAUCHY et al., Defendants.

(Supreme Court, Albany Special Term, January, 1898.)

Costs — Extra allowance.

Where the answer in an action for goods sold put in issue the sale and delivery of more than 300 items and plaintiff recovers, before a referee, a judgment of $20,000, and it further appears that the deliveries were made, as directed by the defendants, to various customers of theirs at different times and in different places, the action must be deemed difficult and extraordinary, within the Code of Civil Procedure, § 3253, and an allowance of $500 is proper.

MOTION for an additional allowance under the provisions of section 3253 of the Code of Civil Procedure.

Alexander & Green, William C. Prime and Samuel Foster, for motion.

Lewis E. Griffith, opposed.

CLEARWATER, J. The plaintiff sued to recover $19,354 for white lead, oils, etc., sold by it to the defendants, and delivered to various customers of the defendants at different times and in different places, as directed by them. An attachment was obtained and is still in force. A bill of items was demanded and served. A defense was interposed, which put in issue the sale and delivery of upwards of 300 items of the plaintiff's claim, proof of which was thus required, and was made.

The cause was tried before a referee, who gave judgment for the plaintiff in the sum of $20,207.11, and who certifies that in his opinion the case was difficult and extraordinary, and that the plaintiff is entitled to an additional allowance. The granting of this is opposed by the defendants upon the ground that the action is an ordinary, and not an extraordinary and difficult one.

In a general way, it may be said that most actions are ordinary, in that similar causes are frequently before the courts; but save for the fact that the form of the action is contract, this cause was neither usual nor simple, and clearly involved more than ordinary labor and preparation by counsel.

The statute should receive a fair, even a liberal construction, and in important and substantial litigations, such as this, a proper allowance should be made, due regard being had to the situation of the defeated party.

An additional allowance of $500 is granted, and may be taxed with the plaintiff's costs.

Motion granted.

ANNA C. RILEY, Plaintiff, *v.* BENJAMIN BRODIE et al., Defendants.

(Supreme Court, Erie Equity Term, January, 1898.)

Highways — Action to cancel a new survey — Survey of a highway long abandoned — Rights of bona fide purchaser — Parties.

Proof, made in an equitable action brought to cancel an order and survey made, in 1895, by the highway commissioner of a town, ascertaining and describing a highway with respect to lands alleged to have been used as such for more than twenty years, tending to show that there is no record of the formal laying out of such a highway; that although once used as such, it was discontinued in 1839 by the town authorities as useless; that thereafter it was a cul de sac entirely on the lands of the plaintiff; that it was grass-grown, uninclosed, and to some extent barred by posts twelve feet apart, and that it was in this condition when the plaintiff's mesne grantor purchased it for value in 1877, entitles the plaintiff, as a similar purchaser, in 1882, to the relief demanded; and her action is properly brought against the highway commissioner, as, in view of the decision that the lands belong to the plaintiff, the statute (Laws of 1890, chap. 569, § 182) providing that any action to enforce the liability of a town for any act or omission of its officers shall be brought in its name has no application.

ACTION to cancel and annul a certificate and survey made by a highway commissioner and also to cancel and annul the record thereof in the town clerk's office and restraining the defendants from taking further action in the premises.

Tracy C. Becker, for plaintiff.

William W. Hammond, for defendants.

LAUGHLIN, J. This action is brought to cancel and annul a certificate or order and survey made by the highway commissioner on January 31, 1895, ascertaining and describing a highway under the statute with respect to lands which have been used as a highway for twenty years or more; and also to cancel and annul the record thereof in the town clerk's office, and to restrain and enjoin the defendants from taking any further action in the premises, and from interfering with the plaintiff's free and uninterrupted use of the lands.

The plaintiff and her grantors have held the record title to and been in actual possession of a small farm on the shore of Lake Erie, in the town of Evans, Erie county, consisting of two parcels or tracts, one being part of Lot 54, in Township 9 and Range 8, and the other lying southerly thereof, and being part of Lot 50, in Township 8 and Range 9, since the first conveyance from the Holland Land Company to Nathaniel Lay in 1819. Each parcel of the farm is divided by a highway known as the Lake Shore turnpike, which passes through the same a few hundred feet back from the lake, and follows the general course of the shore of the lake and runs from Buffalo to Dunkirk and Erie. The *locus in quo* extends over the northerly parcel of plaintiff's land westerly from the Lake Shore turnpike to the beach of Lake Erie, a distance of about 524 feet. The range and township boundary between these two parcels of plaintiff's land crosses the dwelling thereon, which was erected by Nathaniel Lay and is still known as the Lay house. This boundary line passes about two rods south of where the *locus in quo* intersects the Lake Shore turnpike. From about 1819 to 1828, this range and township boundary line formed the boundary between the town of Hamburg on the north and Eden on the south, but all of the farm has ever since been in the new town of Evans.

The highway records and the testimony of the oldest inhabitants, many of whom were sworn on the trial of this case, substantially agree that the Lake Shore turnpike has been used and traveled as a public highway practically as it exists to-day since about 1827. The only record of that part of the turnpike in the vicinity of the *locus in quo*, and on the Buffalo side of this township and range boundary line, shows that in 1847 it was described and recorded as a highway, the record reciting that it had been used as such for twenty years. The only record of the turnpike southwesterly, or on the Dunkirk side of said boundary line, shows that it was formerly laid out as a highway under the name of the Erie road, by the proper town authorities, on the 11th of April, 1840. Prior to 1827, the earliest date that the Lake Shore turnpike has been shown to have been used, there was a road along the lake shore from Buffalo to Dunkirk and Erie.

The description in the deed to Lay, November 17, 1819, refers to the existence of a highway. The highway records show that on May 27, 1817, a highway was surveyed northeasterly from the junction of the town line, the range and boundary line, which is

a few rods southerly of the *locus in quo*, but the description runs it into the lake, and as the shore of the lake has not materially changed, it is evident that there was an error in the survey, or in recording it. This conclusion is confirmed by the fact that the records also show the survey of a road December 26, 1821, recorded March 28, 1822, "Beginning at the town line near Nathaniel Lay's house," and running thence northeasterly towards Buffalo, the courses and distances being given. A survey of this road, made recently, shows it to run through an opening in a woods of just the width of the road. This road lies between the present Lake Shore turnpike and Lake Erie, and it intersects the *locus in quo* about two rods westerly of said turnpike, but toward Buffalo it gradually separates from the latter road. The evidence is not conclusive, but the probabilities are and the fair inference is that this road, the record of which was made in 1822, was the traveled way from Buffalo to the Lay house until 1827, since which time it has not been used.

The record of the earliest road along the lake from the Lay house towards Dunkirk shows that it was surveyed and recorded June 17, 1820, and it is described as "Beginning at the road leading from Nathaniel Lay's to Dibble's near the Turnpike line." The evidence shows that the road as used was along the beach and bluff of the lake, and probably not on the lines as shown by the record. The records also show that on February 15, 1839, after the travel had been diverted from the road on the margin of the lake to the Lake Shore turnpike, the proper town authorities discontinued, as being useless and unnecessary, a road "Leading from Jerusalem Corners road on the north side near the house of Ira Joy, thence along the margin of Lake Erie northeasterly to the house or near it of Nathaniel Lay." By this action, I am of the opinion that the authorities intended to discontinue the road surveyed and recorded June 17, 1820, as hereinbefore shown, but that the descriptions differ for the reason that the road was not used and traveled exactly in accordance with the record. The recollection of aged witnesses as to the precise location of a road from sixty to seventy-five years ago, traversing a new and sparsely settled territory, mostly wooded and of little value, is neither accurate nor very reliable. From the testimony of some of these witnesses, it would be impossible to locate the original highway. Others, however, say — and in disposing of this case, I shall accept their

evidence — that in traveling southeasterly from Buffalo, on reaching the old Lay house, the road led down upon the lake beach, practically along the lines of the *locus in quo*, and that it then ran along the beach for a quarter of a mile to the house of James Peters, who kept the post-office there from 1820 until 1827, and that from Peters' the road ran along the bluff towards Dunkirk. About 1827, when travel was diverted to the Lake Shore turnpike, the post-office was removed to Lay's house. The old road on the margin of the lake remained open, and continued to be used to some extent until it was discontinued in 1839, but after 1827 the principal travel was over the turnpike. Within one year after the discontinuance of the old road, Peters, whose house was on the lake shore, some distance from the turnpike, applied to the town authorities and they laid out a private highway, considerably to the south of the *locus in quo*, to enable him to reach the turnpike. Occasionally after that Peters used the old road, when his private road was impassable, down to 1853, but it does not satisfactorily appear that any part of the old road, excepting the *locus in quo*, which ends at the lake shore beach on plaintiff's lands, was used or traveled by others after its discontinuance in 1839. During the last fifty-eight or sixty years the *locus in quo* has not been a thoroughfare, but a mere *cul de sac*, entirely on the lands of the plaintiff, leading to no habitation or place of business, nor has it been used or traveled by the general public. The only travel or use made of it during this period has been in the summer seasons, by a comparatively few of those residing in the near vicinity, as a means of reaching the beach and the lake, on foot and with vehicles, for pleasure, for water and for sand, gravel and stone. This use has not been sufficiently frequent or extensive to make it more than a single, unimproved, uninclosed, grass-grown wagon track. The highway authorities never took charge of it or worked or improved it as other highways of the town. The plaintiff and her grantors used the wagon road for their own convenience, and sometimes sold the sand and gravel and granted permission to those who used it, but more often, prior to twenty years ago, it was used without such permission, and without any compensation being made for the material taken away. From about 1860 to 1868 a fence was maintained along the Lake Erie side of the Lake Shore turnpike, and at the *locus in quo* the fences joined bar posts from ten to twelve feet apart, and bars were provided for use therein, and

the bars were frequently put up and kept up by the owner. After that period the bars were not kept up, but posts remained, with rail or hedge fences extending either way therefrom, until within a few years, giving it the appearance of a private rather than a public road. Such was the condition of the premises on April 26, 1877, when the plaintiff first saw them, and on that date her husband purchased the premises by warranty deed, and on February 14, 1882, he conveyed the same to the plaintiff through a third party. Since the purchase by plaintiff's husband, the *locus in quo* has seldom been used without his or her permission, excepting by neighbors or acquaintances.

The evidence shows, and it is conceded, that the fee of the *locus in quo* is in the plaintiff. It is not claimed that the lands were ever acquired or formally opened up or laid out by the public authorities as a highway, and there being no record of any such action, the presumption is to the contrary. Harriman v. Howe, 78 Hun, 280.

The claim and contention of the defendants is, that this is a public highway by prescription, which presupposes a grant from the owner. Both at common law and under our statute, before lands can become a highway by prescription, they must have been used by the general public as a highway, under a claim of right, without interruption or substantial change, for at least twenty years, and must have been kept in repair, taken in charge of and adopted by the public authorities, so that the town has become responsible for their condition, and for injuries to travelers resulting through the negligence of the highway officers, and so that persons obstructing the same may be subject to a fine under the statute. Highway Law, § 100, chap. 568, Laws 1890; Elliott on Roads & Streets, 136-139; Harriman v. Howe, 78 Hun, 280; Speir v. Town of New Utrecht, 49 id. 294; 121 N. Y. 430; People ex rel. Cunningham v. Osborn, 84 Hun, 441; Palmer v. Palmer, 150 N. Y. 140; People v. Underhill, 144 id. 324; Lewis v. N. Y., L. & W. R. R. Co., 123 id. 496; City of Buffalo v. D., L. & W. R. R. Co., 39 N. Y. Supp. 4; Caven v. City of Troy, 15 App. Div. 163; McVee v. City of Watertown, 92 Hun, 306; Davenpeck v. Lambert, 45 Barb. 596; Shellhouse v. State, 110 Ind. 509; Engle v. Hunt, 50 Neb. 358; Illinois Central R. R. Co. v. City of Bloomington, 167 Ill. 9.

If the *locus in quo* ever was a highway it had ceased to be traveled

or used as such for more than six years before the commencement of this action, and under the statute it ceased to be a highway, and the plaintiff, the owner of the fee, became entitled to its exclusive use and possession. Mangam v. Village of Sing Sing, 11 App. Div. 214; City of Buffalo v. Hoffeld, 6 Misc. Rep. 200; Matter of Beck Street, 19 id. 571; Woodruff v. Paddock, 130 N. Y. 618; Horey v. Village of Haverstraw, 124 id. 273; City of Cohoes v. D. & H. C. Co., 134 id. 406-7.

The *locus in quo* not having the appearance of a public highway, and the plaintiff having no notice of the claim now made by the town authorities, and there being no record anywhere that this was a public highway, the plaintiff is an innocent purchaser, for value, and is entitled to the protection of a court of equity as against the public, whose officials have been negligent in asserting and enforcing the public rights. City of Buffalo v. Hoffeld, 6 Misc. Rep. 200.

The learned counsel for defendants contends that section 182 of chapter 569, Laws of 1890, which provides that any action to enforce the liability of a town for any act or omission of its officers shall be in the name of the town, requires that this action should have been brought against the town. I think the action is properly brought. The claim of the plaintiff is that the town has no interest in these lands, and such is the effect of this decision. It follows that the town would not be liable for the unauthorized acts of the highway commissioner.

The foregoing considerations lead to the conclusion that the premises in question are not a public highway, and that the plaintiff is entitled to judgment canceling the records, and perpetually enjoining defendants from interfering with her free use and possession thereof. Public officials should be vigilant in protecting the rights of the public, and the court being satisfied that the highway commissioner acted in good faith, and that he had some evidence to justify his action, no costs are awarded against the defendants. A decision may be prepared by plaintiff's attorney in accordance with this opinion, and unless stipulated as to form, will be settled on two days' notice.

Ordered accordingly.

THE PEOPLE ex rel. MORRIS C. DECKER et al., Relators, *v.* ALBERT A. PARMELEE et al., Defendants.

(Supreme Court, Genesee Special Term, January, 1898.)

Election Law — A recount of ballots, cast at a town meeting upon the question of selling liquor, may be compelled — Insufficient alternative writ of mandamus — Effect of petition and affidavits.

The court has power, under the Election Law (Laws of 1896, chap. 909, §§ 111, 113, 114), to require, by mandamus, a recount of ballots rejected at an election, had at a town meeting, where there was a special vote under the Liquor Tax Law (Laws of 1896, chap. 112, § 11, subds. 1, 16) to determine whether liquor should be sold in the town; but where an alternative writ, issued ex parte, contains no allegations as to whether a proper legal return was made, or whether if made, it contains a statement that the ballots sought to be counted were declared void, or whether the ballots in question were, in fact, declared void and were so indorsed, or whether the inspectors failed to count any protested ballots, the writ is insufficient to justify the issue of a peremptory writ; nor can resort be had to the petition or affidavits in order to sustain it.

DEMURRER to alternative writ of *mandamus*.

Bowen & Washburn, for relators.

Randall & Huyck, for defendants.

LAUGHLIN, J. The alternative writ, issued *ex parte*, recites that the defendants, other than the county treasurer, constituted the town board of the town of Leroy, Genesee county, and as such, the inspectors of election at the town meeting held on the 2d day of March, 1897, at which time a separate vote was taken, under subdivision 1 of section 11 of the Liquor Tax Law, on the question as to whether liquor should be sold in that town; and that on the canvass of the votes "they rejected 102 ballots and the votes thereon which should have been canvassed and counted by them, for alleged technical errors and defects." It is further alleged in the writ that the proposition for selling liquor was declared lost, whereas if the rejected ballots had been counted a majority would have been shown for such proposition. The demurrer is upon the

ground that the writ fails to state facts sufficient to authorize the court to grant the relief awarded, to-wit: a recanvass of the rejected ballots, that they be all counted for or against the proposition and that the present recorded result of the election be amended or superseded by a new return showing the true result. The writ directs the town clerk to deliver a sealed package containing the rejected ballots to the inspectors, and, while there is no specific allegation of the fact, it is to be inferred that these ballots have been preserved in the manner provided by section 113 of the Election Law for preserving void and marked ballots. The case was argued upon the theory that the ballots were thus preserved.

Section 16 of the Liquor Tax Law provides for the submission to the electors of the proposition as to whether liquor shall be sold, upon a ballot in the form of the ballot required for voting on constitutional amendments, and with respect to the canvass and return of the votes, provides as follows:

"At such town meeting the several questions may be voted upon by the electors who may legally vote thereat. A return of the votes so cast and counted shall be made as provided by law, and if the majority of the votes shall be in the negative on either of such questions, no corporation, association, copartnership or person shall thereafter so traffic in liquors or apply for or receive a liquor-tax certificate under the subdivision or subdivisions of such section 11 upon which the majority of votes have been cast in the negative. * * * A copy of the statement of the result of the vote, upon each of such questions submitted, shall, immediately after such submission thereof, be filed by the town clerk or other officer with whom returns of town elections are required to be filed by the Election Law, with the county treasurer of the county * * * and no liquor-tax certificate shall thereafter be issued by such officers to any corporation, association, copartnership or person under such subdivision of section 11 of this act upon which a majority of the votes may have been cast in the negative."

Upon grounds of public policy the court have, with one exception I believe (the case of People ex rel. Sanderson v. Payne, 12 Abb. N. C. 103), uniformly held that after the ballots have been canvassed and destroyed under the laws which formerly provided for disposing of them in that manner, that a writ of *mandamus* should not issue to compel the election officers to reconvene and make a new return changing the result, on the ground of fraud

or mistake in making the original canvass or return. In view of the very material changes contained in section 11 of the Election Law, by which the ballots are now preserved in the condition in which they are voted and, under section 113, may be inspected by an order of the court, it may well be that the rule hereinbefore referred to should not be now applied to such ballots.

Section 114 of the Election Law now expressly provides that a writ of *mandamus* may issue, upon the application of any candidate voted for at the election, requiring a recount of the votes on the ballots rejected by the inspectors as void and not counted, and also the ballots objected to as marked for identification. The inspectors are required to indorse on all ballots which they reject and exclude from the count as void the specific reason for such rejection, and the return must specify the number of such ballots. § 111 of Election Law. The same section of the law requires the inspectors to indorse on all ballots protested as marked for identification the words "Protested as marked for identification," specifying over their signatures the mark or marking to which objection is made, and while they are required to count such protested ballots, their return must contain a statement of the number. The inspectors are also required to preserve and return in a sealed package the void and protested ballots. If that has been done, such ballots are presumably now in the same condition as when the ballot-boxes containing them were opened by the inspectors at the close of the polls and before the canvass. Matter of Election of Member of Assembly, 18 Misc. Rep. 391, and cases cited.

The alternative writ demurred to does not require a recanvass of the votes *counted*, but only of the votes *not counted*. The inspectors had no authority to reject the ballot and exclude it from the count excepting where they determined that the ballot was void, and after such determination indorsed upon it the specific reason for the rejection. The writ charges that by the action of the inspectors about one-tenth of the qualified voters of the town of Leroy were disfranchised by having their ballots wrongfully excluded from the count. The legislature has not deemed it against public policy to compel a recanvass of the void and protested ballots containing the names of candidates for office, but has expressly provided that this may be done. § 114 of Election Law. The counsel for the inspectors contends that inasmuch as no express provision has been made by the legislature for a recount of

the votes on constitutional amendments and other propositions, that no authority exists, either under the statute or at common law, therefor.

If the provisions of the General Election Law relating to void and protested ballots do not apply to constitutional amendments and propositions submitted to the voters, then it would be the duty of the inspectors under the Liquor Tax Law hereinbefore quoted to count all the ballots where they were able to determine the intention of the voter, and the right to the writ of *mandamus* would be clear. It has always been the law that without any statutory authority the Supreme Court possesses inherent power, by the writ of *mandamus*, to compel all public officials to perform their statutory duties. Under this power boards of canvassers and election inspectors may be compelled to reconvene and completely discharge, as required by law, any duty devolving upon them which they have not fully discharged. People ex rel. Emerson v. Board of Aldermen, 47 N. Y. St. Repr. 451; affirmed, 65 Hun, 300; see cases cited in both opinions.

Upon the same principle, if the inspectors have not filled out and signed their return as required by law they will be compelled to meet again and do so; or, if they have filed conflicting returns, they will be compelled to file new and correct returns. People ex rel. Gleason v. Blanc, 14 Misc. Rep. 620.

If the inspectors were governed by the Election Law in canvassing and making a return of the ballots voted on this proposition as to whether liquor should or should not be sold in Leroy, then it was their duty to comply with all of its provisions, including the statement in their return of the number of void and protested ballots separately, properly indorsing such ballots and sealing and returning the same.

The construction of the Election Law contended for by the defendants would lead to the anomaly of having the void and protested ballots on constitutional amendments and other propositions submitted thus indorsed, sealed and returned by the inspectors and with authority on the part of the court to open and inspect the same, but all to no purpose, as the court would be entirely without authority to require the correction of any error that might clearly appear to have been made.

The writ does not contain any allegation as to whether a proper return was made as required by law, or whether the return con-

tains a statement that the ballots sought to be counted were declared void, or whether the ballots were in fact declared void by the inspectors and so indorsed; or whether the inspectors failed to count any protested ballots. In a matter of this importance, while I am impressed with the propriety of compelling these inspectors to properly perform their statutory duties and of reviewing their action, at least to the extent of determining whether they have complied with the law, yet a peremptory writ of *mandamus* should only issue on facts conceded or found, and I think the allegation of the alternative writ that these ballots should have been counted is an allegation of a legal conclusion, and that the writ fails to state the facts warranting the conclusion. If the court were to issue a peremptory writ on this alternative writ, for aught that appears the inspectors might be compelled to count void ballots which were properly declared void, indorsed as void, returned as void and accounted for in the return as void. On a demurrer to an alternative writ of *mandamus* resort cannot be had to the petition or affidavits for the facts to sustain it. The alternative writ is a pleading and must stand or fall on the sufficiency of its own recitals of facts. Code Civ. Pro., § 2076; People v. Columbia Club, 20 Civ. Pro. 323.

The demurrer must, therefore, be sustained.

For the purpose of determining whether the relators should have leave to amend, I have examined the petition and affidavits and think they present a meritorious case. The demurrer is sustained, but with leave to the relators, within twenty days, and upon payment of costs, to amend the writ by reciting a plain and concise statement of the facts set forth in the petition and affidavits on which the writ was issued, or to apply to the court for an inspection of the void and protested ballots, and for leave to serve an amended writ setting forth what is shown by such ballots, and upon other affidavits as they may be advised. An interlocutory judgment may be entered accordingly.

Judgment accordingly.

WILLIAM S. DE CAMP, Individually and as Trustee under the Last Will and Testament of JULIA L. DE CAMP, Deceased, Plaintiff, *v.* EDWARD THOMSON, Jr., et al., Defendants.

(Supreme Court, Herkimer Special Term, January, 1898.)

Action to compel the offset of a judgment rendered between the same parties, in regard to which an appeal is pending.

An undertaking, given under Code of Civil Procedure, § 1327, upon an appeal to the Court of Appeals, suspends all proceedings upon the judgment appealed from until a final decision is had; and hence such a judgment, although merely for costs, cannot, pending such an appeal, be set off, by means of an action by the respondent in the Court of Appeals, against a subsequent judgment, not appealed from by and recovered against him in the Supreme Court for costs by the same persons who were appellants in the Court of Appeals.

ON the 29th day of June, 1896, in an action brought in the Supreme Court, the plaintiff in this action obtained a judgment against the defendants John A. Dix and Edward Thomson, Jr., which determined certain property rights and awarded costs to the plaintiff, in the sum of $1,805.34. An appeal was taken by the defendants in the action from that judgment to the Appellate Division of the Supreme Court, Fourth Department, and on the 23d day of May, 1897, said last-mentioned court made its decision affirming said judgment with costs, and judgment of affirmance was duly entered. From that judgment of affirmance the defendants duly appealed to the Court of Appeals, and gave an undertaking as provided in section 1327 of the Code of Civil Procedure, which undertaking was given with the intention on the part of the defendants to stay the execution of said judgment until the decision of the Court of Appeals. The appeal to the Court of Appeals is still pending, it not having been reached upon the calendar or argued.

On the 15th day of April, 1897, in another action brought in the Supreme Court, by the plaintiff above named against the said defendants John A. Dix and Edward Thomson, Jr., after trial had, the complaint in said action was dismissed, and judgment was ordered in favor of the defendants John A. Dix and Edward Thomson, Jr., against the plaintiff, for costs, which amounted to the

sum of $306.05. Such judgment was duly entered and notice of the entry thereof was duly served upon the plaintiff's attorney in that action. In that action a temporary injunction was obtained, and the plaintiff gave an undertaking in the sum of $1,000, conditioned for the payment to the defendants for any damages that they might sustain by reason of such injunction. Upon the entry of judgment dismissing plaintiff's complaint such injunction was dissolved. Charles E. Snyder, one of the defendants above named, was the attorney of record for the defendants in that action. From that judgment no appeal was taken by the plaintiff, and the time in which an appeal can be taken expired before the commencement of this action. After the time to appeal to the Appellate Division expired, the defendants in that action, Dix and Thomson, caused an execution to be issued upon the said judgment, and delivered the same to the defendant Warren H. Eaton, sheriff of the county of Herkimer, and directed him to make such execution out of the property of the plaintiff, and said sheriff was endeavoring to collect such judgment at the time this action was commenced.

This action is brought by the plaintiffs above named to compel the defendants Dix and Thomson to offset the judgment for $306.05 which they recovered against the plaintiff, against the judgment obtained by the plaintiff against them, to the amount and extent thereof, and thus compel the defendants to pay the judgment against them, which is pending in the Court of Appeals, to that extent, and to restrain them from collecting or attempting to collect the said judgment so recovered by them from the plaintiff, or any part thereof.

C. D. Adams, for plaintiff.

Charles E. Snyder, for defendants.

MCLENNAN, J. Section 1327 of the Code of Civil Procedure provides a method by which a person who has perfected an appeal to the Court of Appeals from a judgment rendered against him may prevent the enforcement of said judgment until the decision of his appeal. The section provides in substance that if the appellant in such case gives a written undertaking, executed in proper form, to the effect that if the judgment appealed from is affirmed he will pay the same, he shall not be called upon or compelled to

pay such judgment, or any part thereof, until the affirmance of the judgment upon such appeal.

It would seem that by the provisions of the Code referred to a judgment debtor has an absolute right in the case specified to appeal from a judgment against him, and by giving a proper undertaking to defer payment until the judgment appealed from is affirmed, even if his only purpose is delay. If the contention of the counsel for the plaintiff is correct, an appellant in such case may be compelled to pay a judgment appealed from, and which is secured by a proper undertaking, in full or in part, immediately, provided he happens at the time to be the owner of a judgment against his judgment creditor, and is seeking to enforce the same. Such would be the only effect if the course suggested by plaintiff's counsel is adopted.

The defendants Dix and Thomson have a valid judgment against the plaintiff for $306.05. It is final, the time to appeal having expired. The whole amount of that judgment is payable immediately. The defendants are entitled to such payment, and if it is not paid they are entitled to enforce payment by execution. If the amount of such judgment in favor of the defendants can be withheld from them to apply in payment of plaintiff's judgment, which is secured by an undertaking on appeal, then to that extent the defendants would be compelled to pay plaintiff's judgment, notwithstanding their undertaking, and notwithstanding the express provisions of the Code, which declare that in such case they need not pay any part of such judgment until affirmed by the Appellate Court. Under the provisions of the Code the judgment of Dix and Thomson against the plaintiff is payable now, and payment can be enforced immediately. The judgment of the plaintiff against Dix and Thomson is not payable now. It may never be payable, and in no case can payment be enforced until the Court of Appeals shall have affirmed the same, which may be a year or two years hence.

In the case of Pierce v. Tuttle, 51 How. Pr. 193, decided by the General Term, Fourth Department, the head-note is as follows: "Where the plaintiff has obtained a final judgment against the defendant in one action, and the defendant has obtained a judgment against the plaintiff in another action in which the parties are the same, from which the plaintiff has appealed, the defendant's judgment cannot be set off against the plaintiff's judg-

ment while the appeal is pending. Proceedings on the judgment appealed from are suspended during the pendency of the appeal."

It was held in Terry v. Roberts, 15 How. Pr. 65, that an appeal from a judgment suspended the right to set it off.

In the case of De Figaniere v. Young, 2 Rob. 670, it was distinctly held that a judgment cannot be set off while an appeal from it is pending.

In Hardt v. Schulting, 24 Hun, 345, the head-note is as follows: "The plaintiff cannot have a judgment recovered by him, from which an appeal has been taken by the defendant, set off against the costs of two motions awarded to the defendant in the same action." In the Matter of Kloster, 40 Hun, 374, the same rule is stated.

The cases cited by plaintiff's counsel do not in any way conflict with the authorities above referred to. The authorities without exception, so far as I have been able to discover, are to the effect that an appeal from a judgment suspends the right to set-off. As suggested by plaintiff's counsel, most of the decisions were in cases where a motion was made to compel the set-off, rather than in an action brought for such purpose, but it would seem that that fact can in no way change the rule, and the authorities would seem to be decisive that in a case such as this the plaintiff cannot set off the judgment against him against the judgment recovered by him against the defendants, while the appeal therefrom is pending in the Court of Appeals.

The evidence shows that the judgment recovered by Dix and Thomson against the plaintiff is solely for the costs of the action, and that the defendant Snyder was the attorney of record in that action, and that he has not been paid for his services. It is insisted by the defendants that such judgment belongs to the attorney, and that he has a lien upon the same for his services as such, and, therefore, that it cannot be set off. It is unnecessary to pass upon that question, in view of the conclusion reached upon the first proposition. No facts are presented by the evidence in this case which would justify the court in staying the collection of the judgment obtained by Dix and Thomson against the plaintiff. The evidence shows that Dix and Thomson are responsible, and that plaintiff's judgment against them is abundantly secured.

There is still another reason why a stay should not be decreed in this case. In the action brought by the plaintiff against Dix and Thomson, and in which action they recovered the judgment

in question against the plaintiff as before said, the plaintiff procured an injunction pending the determination of that action, and executed and delivered to the defendants a bond in the sum of $1,000 conditioned for the payment by the plaintiff to the defendants of all damages which they should sustain by reason of such injunction. By the recovery of the judgment in question such injunction was dissolved, and the defendants are entitled to proceed upon the bond so given, and to enforce the payment of any damages which they have sustained by reason of the issuing of the injunction in that action, and until the judgment involved in this action is collected from the plaintiff, or it is determined whether it can or cannot be collected, it cannot be accurately determined what sum, if any, the defendants are entitled to recover as damages for the issuing of the injunction referred to. In any event plaintiff's action was unnecessary. The plaintiff could have obtained the same relief demanded in this action, if entitled to it, by motion, and the expenses of this litigation could thus have been avoided.

But, as before suggested, the proof does not disclose any reason why the relief demanded should be decreed. The defendants are abundantly responsible. The judgment recovered by the plaintiff is abundantly secured. Nothing appears to indicate that any hardship will result to the plaintiff, that his property will be sacrificed, in case he pays the judgment recovered against him at the present time.

It follows that the plaintiff's complaint should be dismissed, with costs. Judgment is ordered accordingly.

Judgment accordingly.

DAVID E. DEXTER, Individually and as Executor, Etc., et al., Plaintiffs, *v.* THE JEFFERSON PAPER CO., Defendant.

(Supreme Court, Jefferson Special Term, January, 1898.)

1. Watercourses — A single hydraulic work, constructed by a common grantor — Rights of grantees.

Where the common grantor of water powers upon a river, whose flow naturally passed in quantity along only one of its two channels, has, more than fifty years ago, with a view to equalizing the flow and power, dammed the entire river by three dams stretching from

shore to shore and connecting two islands, the whole construction must be considered one hydraulic work to the maintenance of which, in its existing condition and height, all the grantees are, by prescription, entitled and their grants must be satisfied in the order of their priority.

2. Same — Title by prescription — Nonuser.

The right to use water can be acquired by prescription only through an adverse user, for more than twenty years, under a claim of right, and owners of one of the islands, upon which one of the dams abutted, acquire, by nonuser, no prescriptive right to the use of the water in the one-half of the channels which pertain to the island.

ACTION to determine the rights of the respective parties to this action in and to the water powers upon the Black river, in the village of Black River, Jefferson county, N. Y., and to obtain an injunction restraining the defendant, Jefferson Paper Company, from using water in excess of the amount to which it is entitled.

Rogers & Atwell, for plaintiffs Dexter.

Purcell & Carlisle, for plaintiff Empire Wood Pulp Company.

Elon R. Brown, for defendant Black River Pulp Company.

Porter & Walts (Hannibal Smith, of counsel), for other defendants.

MCLENNAN, J. Black river flows through the village of Black River, in the county of Jefferson, N. Y., in a westerly direction, and is divided at the place in question by Poor island into two streams or branches, called the north and south branch respectively. Poor island is about four-fifths of a mile long, 100 feet wide at the foot or westerly end, 700 feet wide at the center, and tapers gradually from there to a point at the head. Black river is a fresh-water stream, and at the place in question is nonnavigable. At the foot or westerly end of Poor island there is a small island called Mill island, which also extends east and west, and which further divides the waters of the river, and is separated from Poor island by a narrow channel. The branch of Black river on the north side of Poor and Mill islands is wider, and the channel is much deeper than the south branch, and the two branches are so

situate that in times of low water, if the river were in its natural state, the greater portion of the water of the entire river would flow in the north branch, and very little would flow in the south branch.

All the water powers involved in this action are made available by the construction and maintenance of three dams, one extending from the north shore of the north branch of the river to the foot of Poor island, one extending from the foot of Poor island to the head of Mill island, and the other extending from the south shore of the south branch of the river to the south shore of Mill island. These three structures effectively dam the water of the entire river, and as now constructed, and as they have been maintained for more than fifty years, are sufficient to furnish a head of twelve feet for all the water powers involved in this litigation, and in no other way can the water powers be effectively utilized. If the dam extending across the north branch to the foot of Poor island were removed, none of the water powers on the south branch could be made available except in times of very high water, because substantially all the water of the river would flow in the north branch. If the dam extending from the south shore of the south branch to Mill island, or the dam extending from the foot of Poor island to the head of Mill island, were removed, the water powers pertaining to the north branch could not be made effective, because when a head of less than nine feet would be reached, the water would set back around the head of Poor island and flow into the south branch, and so on unobstructed into the main river and below all the water powers.

It is essential to the effective and practical use of all the water powers thus pertaining to the north branch, as well as those pertaining to the south branch, that a head of twelve feet should be obtained, and that can only be accomplished by maintaining the three dams above referred to as they are now constructed, and to keep the water at each dam substantially at its crest.

The two branches of the river thus dammed do not constitute and are not intended as storage ponds, but are simply available for the purpose of procuring the proper head of water for each of the water powers.

All the water power rights involved in this controversy which pertain to Mill island, the south shore of the south branch of Black river, and the north shore of the north branch of said river, opposite and adjacent to Poor island, were originally owned by one Christo-

pher Poor, he having become such owner prior to 1830. While such owner he constructed or caused to be constructed the three dams above mentioned, abutting, two of them, on Poor island, as before described. At the time he did not own Poor island, and did not acquire it or any interest therein until the year 1847, but no question is raised in this action as to the right of Christopher Poor to abut the dams in question on Poor island, and it is substantially conceded by all parties that each water user has acquired the right by prescription to have the said two dams abut on Poor island, and to maintain or cause to be maintained the three dams referred to substantially as they now are, they having so abutted and having been so maintained for more than fifty years.

The grants of water power to the plaintiffs Dexter, or to their grantors, and under which they now claim, were all made by Christopher Poor between the years 1831 and 1847, and prior to the time when he became the owner of Poor island, except the grant of the Horton lot, so called, on the south shore of the south branch, which was made by Poor to William J. Young on January 5, 1850, and which is now owned by the plaintiffs Dexter; and also a grant made by Matthew Poor, the devisee of Christopher Poor, as hereinafter described, to Vincent Slater on December 7, 1855, and by which grant the plaintiffs Dexter claim to be entitled to 300 inches of water for propelling machinery upon Mill island.

The grants of the water power now owned by the plaintiff, The Empire Wood Pulp Company, were also made by Christopher Poor prior to the time when he became the owner of Poor island.

The grant under which the Black River Pulp Company claims was made by Poor to Ray G. Baum, October 2, 1850, while he was the owner of Poor island.

The defendant Henry C. Dexter also acquired certain rights by grant upon the north shore of the north branch, through a conveyance made by Poor to one O. D. Starkm, dated April 5, 1850, while he, said Poor, was the owner of Poor island.

The defendant Wilcox in like manner acquired water-power rights on the south shore of the south branch through a grant made by Poor to William S. Wilcox, dated January 22, 1852.

The defendant Henry C. Dexter also acquired certain water-power rights on the north shore of the north branch by grant from Matthew Poor, the devisee of Christopher Poor, which grant is dated January 2, 1866.

Christopher Poor died about the year 1854, leaving a last will and testament, by which Poor island and all the other water powers then owned by him at the place in question, and which are in controversy here, were devised to Matthew Poor above mentioned.

The defendant Jefferson Paper Company acquired its title by deed from Matthew Poor about the year 1887, which deed conveyed the entire westerly end of Poor island, and included about seven acres of land.

Jefferson Paper Company and all the other defendants, except the Black River Pulp Company, have entered into an agreement which, as between themselves, determines their respective rights, and there is no controversy as between them.

The grants of water power made by Christopher Poor to the plaintiffs are in many cases indefinite and uncertain, and were made at a time when there was an abundance of water in Black river for all purposes then contemplated. Such grants, however, if strictly construed, would entitle the grantees of powers pertaining to the south branch to nearly, if not quite, the entire flow of the river at periods of low water at the present time.

After the defendant Jefferson Paper Company acquired the foot of Poor island, it erected a paper mill with sufficient machinery to require for its operation substantially all the water that flows in both branches of Black river at times of low water, and it claims the right as riparian owner, by virtue of its said grants, to use all the water which may flow in the north branch of said river to the middle of the stream, and as before said, the natural condition of the channel and the construction of the dams in question are such as to enable it to use substantially all the water of the entire river at such times, and regardless of anything that the water-power owners upon the south branch may do.

At certain seasons during almost every year there is not sufficient water in the entire river to supply the plaintiffs with the amounts specified in their respective grants, and at the same time supply Jefferson Paper Company with the amount of water required for its purposes.

The plaintiffs claim that the three dams before mentioned and Poor island constitute one hydraulic work, and that they are entitled to the amount of water specified in their several grants, to be taken from the entire pond or the north branch of the river, if necessary; that said grants where indefinite are to be interpreted as to amount by the amount of water which they have used under

the same; and they also claim that they have acquired by prescription the right to use water pertaining to the north shore of the north branch, and also pertaining to both shores of Poor island.

The defendant Jefferson Paper Company contends that as against the plaintiffs it is entitled to the entire flow of water in each branch of the river to the thread of the stream, as riparian owner. That the grants of Christopher Poor to the plaintiffs in no manner related to the water rights pertaining to Poor island, or to the north shore of the north branch of the river, and that the plaintiffs, or either of them, have not acquired any right by prescription in or to such water.

It will be observed that Christopher Poor was the common grantor through whom all the parties to this action acquired whatever rights they have by grant to the water powers in question. That all of the grants under which plaintiffs claim, with the exception of the grant of the Horton lot, so called, were made by Christopher Poor before he owned or had acquired any right, title or interest in or to Poor island. That the grants to the defendants The Black River Pulp Company and Henry C. Dexter, of their water powers on the north shore of the north branch of Black river, were made by Christopher Poor while he owned and was in possession of Poor island. The only grant pertaining to the south branch, made by Christopher Poor while he owned Poor island, was to the defendant Wilcox. That the defendant Jefferson Paper Company acquired its title from Matthew Poor, the devisee of Christopher Poor, after all the other conveyances in question were made.

None of the water powers pertaining to Poor island were in any manner utilized or developed until after the conveyances to the Jefferson Paper Company in 1887. All of the other water powers mentioned in the several grants to the respective parties were developed long before, and have been used for upwards of fifty years.

Upon the facts in this case it must be found:

First. That the owners of the respective water powers have each acquired by prescription the right to have the two dams above mentioned abut on Poor island, and to maintain or cause to be maintained the three dams at their present height and substantially as they now are, and to have the water maintained to the crest of each of said dams.

Second. That the three dams, Poor island and the two branches of Black river at the place in question, must be regarded as constituting a single hydraulic work, the use of either being impracticable without the other.

Third. That the right accrued to abut the dams in question on Poor island does not carry with it or give any right to use the water pertaining to either shore of the island. Such right can only be acquired by prescription, by an open and notorious use of the water under claim of right, in hostility to the rights of the riparian owner. That the acquisition of such right cannot be predicated upon the nonuser by the owner, no matter how long continued. That in such case the owner is not required to assert his right to use the water pertaining to his share until he desires to utilize the same.

Fourth. That the plaintiffs Dexter and the Empire Wood Pulp Company, by virtue of their respective grants, excepting the grant of the Horton lot, so called, are only entitled to the water described therein, as against one-half of the channel adjacent to the south shore of the south branch of Black river, and to Mill island. That such grants do not entitle them to any water pertaining to Poor island, or to the north shore of the north branch of the river. They are entitled to have flow in said south branch so much water as naturally flows therein when the three dams are full to the crest, or when twelve-feet head is maintained at each of said dams. That where the amount of water conveyed is indefinite, it is to be determined by the conditions which prevailed at the time the grants were made, and the interpretation of the parties as evidenced by the amount of water used under such grants. That the grants must be satisfied in the order of their priority, and cannot be impinged upon by subsequent grants.

Fifth. The plaintiff Dexter, by virtue of the grant of Horton lot, so called, made January 5, 1850, when Christopher Poor was the owner of Poor island, is entitled to the amount of water therein specified from that pertaining to the south shore of the south branch, if sufficient after satisfying the grants previously made, and if not, then from water pertaining to Poor island.

Sixth. The water-power rights of the Black River Pulp Company, situate on the north shore of the north branch, having been acquired by it through a grant made by Christopher Poor while he was the owner of Poor island, is entitled to the amount of water specified in said grant from that which pertains to said north

shore, if sufficient after satisfying the grants previously made pertaining thereto, and if not sufficient, then from water pertaining to Poor island.

Seventh. The same rule applies to the water power now owned by the defendant Henry C. Dexter, conveyed to his grantor O. D. Starkm by deed, dated April 5, 1851, and also to the grant to the defendant Wilcox by Christopher Poor, dated January 22, 1852, and also to the grant to the defendants Dexter made by Matthew Poor, the devisee of Christopher Poor, dated January 2, 1866.

Eighth. The defendant Jefferson Paper Company, by virtue of its grant of the foot of Poor island from Matthew Poor, dated , 1887, became entitled to the water which naturally flows in one-half of each of the channels of said river pertaining to Poor island when a height of twelve feet is maintained at each of the dams before mentioned, unless said Poor or his grantor had previously conveyed some portion of the same, or unless some part thereof has been acquired by others by prescription.

Ninth. Either party to this action may have acquired the right to use water in excess of the amount specified in his grant by prescription, not only of water pertaining to the shore specified in the grant, but also to water pertaining to any other shore or to the entire pond. I have already indicated what is necessary under the circumstances of this case to establish such right by prescription. The right to abut the dam on Poor island gives no right to use the water in the one-half of the channel pertaining to said island. Nonuser of the water-power rights pertaining to Poor island by Poor or by his grantors or grantees, no matter how long continued, cannot aid to establish prescription. The right to use water can only be acquired by prescription by showing a continuous adverse user under a claim of right for more than twenty years.

It was agreed between the parties upon the trial of this case that if proof was deemed necessary, in order to ascertain what amount of water was intended to be conveyed by any of the grants in question, where the amount was indefinite, or to determine what rights had been acquired by prescription by any of the parties, that such proof should be taken before a referee appointed for that purpose. A reference is, therefore, ordered to take the proofs as to the amount of water intended to be conveyed by the respective grants, where the same is indefinite and uncertain, and also to take such proof as may be offered in relation to any rights that may have been acquired by prescription by any of the parties

to this action; and also to take proof as to whether any of the rights so acquired have been abandoned, and also to take such proofs as may be offered as will enable the court to determine what amount of water each of the parties to this action is entitled to, and to report the same with his opinion.

Ordered accordingly.

CARRIE L. HAZARD, Plaintiff, *v.* EDWARD F. WILSON et al., Defendants.

(Supreme Court, Niagara Special Term, January, 1898.)

Foreclosure — Estoppel.

Where a mortgagee, in writing, promises the undisclosed agent of the equitable owner of lands and who is also liable to pay a part of the mortgage debt, to release from the mortgage an acre of land upon the payment of $500, a sum already due upon the mortgage, the mortgagee anticipating that buildings to be erected on the lands would benefit her other adjacent vacant property, and the equitable owner, after the payment of this sum, erects, in reliance upon the promise, valuable buildings upon an acre, which he selected himself, as the mortgagee made no selection, and the buildings erected benefit her adjacent vacant lands, she will be deemed to be estopped from selling the selected acre upon the foreclosure of her mortgage.

ACTION of foreclosure.

Norris Morey, for plaintiff.

Warner & Lindsay, for defendants Grant, Wilson, Julius A. and Arthur G. Kuck.

SPRING, J. On March 22, 1894, the defendant Wilson was the owner of the lands and premises described in the complaint, and on that day executed the bond and mortgage in suit.

On June 1, 1895, Wilson, by written agreement, sold to the defendant Grant these lands for $15,665, $750 whereof were to be paid September 1, 1895, a like sum December 1st of that year, and the residue in payments of $1,500 each every six months

thereafter, and he was to receive a warranty deed when $5,000 were paid on the purchase price, and give back a mortgage to Wilson to secure the amount then unpaid, and he was to assume as part of the purchase price whatever there was unpaid on this mortgage in suit, and by the terms of the mortgage the mortgagee was to release any portion of the land upon being paid $500 for each acre so released.

July 19, 1895, Grant, also by written contract, sold to the defendants Jamison and four others one-half of the lands in controversy, excepting three and ninety-five hundredths acres situate west of the Buffalo & Lockport Railroad track, for the sum of $9,583. Fifteen hundred dollars of this purchase price were paid in cash, and Grant agreed to pay out of the cash payment $500 on plaintiff's mortgage. Grant was to give a deed upon receiving $5,876, and the grantees were to assume the payment, among other burdens undertaken by them, of one-half the balance remaining unpaid on plaintiff's mortgage after the payment of $500 had been applied thereon. This agreement, though bearing date July 19th, was not, in fact, executed until the 27th of that month. Contemporaneously with this agreement Wilson and Grant entered into a contract in writing whereby Wilson undertook to assume Grant's part of the same and Grant assigned the agreement to Wilson.

In September Wilson conveyed to Grant the three and ninety-five hundredths acres, and an undivided one-half of the other lands described in the mortgage, and took back a mortgage to secure the payment of $6,449.67. While the terms of this mortgage do not coincide with those embodied in the agreement of June 1st, yet that agreement is the only basis for the conveyance, and the only evidence of any interest in the land held by Grant. By the deed Grant assumed the payment of one-half of the incumbrances on the lands, including that of plaintiff. This modification of the agreement of June 1st was rendered necessary by the contract Grant had made in selling a portion of the lands to Jamison and others, and which had been ratified by Wilson. In compliance with the agreement executed July 27th, Wilson subsequently conveyed the lands described therein to Jamison and his covendees. So in the summer of 1895 Grant became the equitable owner of all the lands covered by the mortgage in suit and later of the three and ninety-five hundredths acres west of the railroad lands, and an undivided one-half of the remaining prem-

ises, and was liable to pay one-half of plaintiff's mortgage, and also by his agreement with Jamison and the other vendees was to pay $500 thereon. These agreements were all completed before August 1, 1895, so the liability to pay the $500 attached before that day. Plaintiff's mortgage was then due and any payment made upon it could not, of itself, be made the basis of any legal consideration. Arend v. Smith, 151 N. Y. 502. And beyond that the payment of $500 had explicitly been provided for. So far as the evidence shows, plaintiff had no actual knowledge of any of these transactions.

Grant designed to erect a factory upon an acre of this land west of the railroad. He or Wilson procured a release from a mortgage lien prior to that of plaintiff's and sought to obtain a release of plaintiff's mortgage to an acre of the land. Mr. Mason was then acting as attorney for the plaintiff to make collections on this mortgage, and had it with the bond in his custody. Wilson interviewed Mason, explaining to him the project of the factory site, and the enhancement of values that would follow to lands in that vicinity, and asked for a release of an acre of the land for the purpose of putting up the manufactory thereon. Mason advised plaintiff of the desire of Wilson and she requested him to see Mr. Arend, whom she at times consulted. Mason then explained the situation to Arend, who believed the erection of the factory advisable, and recommended giving the release. Mason thereupon wrote the following letter to Wilson:

"*July* 25, 1895.

"Mr. E. F. WILSON, *Tonawanda:*

"DEAR SIR.— Miss Hazard will extend your mortgage for two years, to be paid in two equal annual payments, and also release one acre on the payment of $500, provided the payment is made before August first, 1895.

"EDWARD C. MASON,
"*Atty. for Miss Hazard.*"

This letter was shown to Grant and the $500 were paid July 31st, and Grant immediately proceeded to erect his factory, and expended over $8,000 on that venture, and seeks to have the acre covered by these buildings relieved from the lien of the mortgage which plaintiff is now foreclosing.

While the payment of the $500 cannot be urged as a considera-

tion for the release of the land, it is forceful as a circumstance showing compliance with the conditions contained in Mason's letter.

Mason had authority sufficient to bind the plaintiff. She was apprised of the request of Wilson, and in effect turned the consideration of the matter over to Arend, and when the latter advised extending the time for the payment of the mortgage, and to give the release, that was substantially her direction. She did not tell Mason to get Arend's advice and report to her, but her inability to meet the exigency of the situation was manifest, and so she committed it to her friend and adviser. That Mason so construed her commission and the authority of Arend is obvious from the letter he wrote. Mason must have realized that on the strength of this letter money would be expended in the erection of the factory, and he did not suggest calling to get the release, but imposed one condition — the payment of the $500. This money was paid to him within a week after his letter, and he evidently expected that was in compliance with the requirement he had exacted. Mason is too reputable a lawyer to write this letter without any suggestion from plaintiff, as she would have us believe. She was, therefore, responsible for what Mason did. The letter was submitted to Grant. He relied upon it and expended the large sums of money required in the erection of this plant and equitably should be protected.

The inducement for the release of the acre and extension of the mortgage was not the payment of the $500, but the plaintiff owned a large tract of vacant property. The erection of the factory was expected to increase its value. That was the inspiring purpose for the release. Owners of property who pay a bonus to factorymen for establishing a plant in which workmen are to be employed are not making a donation, but it is *quid pro quo*. They make it as an investment and anticipate returns in the enhanced value of their property.

It was expected the erection of the plant would follow the release, and that expectation was realized, and now that Grant, for whom Wilson acted, has performed, the plaintiff should not be heard in a court of equity to resist performance on her part.

It is not of the utmost importance whether or not the letter in terms is a release of the land from the operation of the mortgage. The design was to have it operative for that purpose. Grant so construed it and erected his buildings in the faith that it was

tantamount to a release, and the plaintiff is estopped to assert that it is not so in effect. The doctrine of estoppel in *pais* is simply the declaration of an equitable principle to prevent injustice, and to protect those who have relied upon the acts or admissions of others, made with the expectation that such reliance would be placed upon them. The authorities are a unit that where a person has induced another to act in a particular manner he will not be permitted to evade the effect of his admission where injury would result to one who has parted with value on the strength of such admission. Town of Brookhaven v. Smith, 118 N. Y. 634; Crawford v. Ormsbee, 6 App. Div. 50; Brown v. Bowen, 30 N. Y. 519-540 et seq.; Dezell v. Odell, 3 Hill, 215; Pomeroy's Eq. Juris., §§ 802 *et seq.*

Intentional fraud is not the essence of the doctrine of equitable estoppel. Continental N. Bank v. National Bank of Commonwealth, 50 N. Y. 575; Dean v. Benn, 69 Hun, 519-529; Rice on Evidence, 714; Pomeroy's Eq. Juris., § 803.

The letter of Mason granted two favors, which had been sought by Wilson — the extension of the mortgage for two years and the release of an acre. They are inseparably connected in the letter. There is no pretense of any definite promise of an extension except that contained in the letter of Mason. The plaintiff denies any knowledge of the conversation with Mason authorizing the release or referring the matter to Arend, or of the letter of Mason, and yet her complaint, verified by her, avers an extension was granted, which tallies precisely with that allowed by Mason. If she knew of the extension, the conclusion seems irresistible she must have possessed information of the other coincident fact.

It is urged that the release fails to designate any particular acre, and is, therefore, void for indefiniteness, and authorities are cited to support that contention. There is no suggestion that any fraud was perpetrated or advantage taken in the selection of the acre chosen. The $500 per acre made the highest price of the land sold, as appears from the agreements, and it was stipulated releases would be executed upon the basis of that sum per acre. It does not appear the acre in question exceeded in value any of the rest of the land. Therefore, the position of plaintiff is not based upon any sinister motive in Grant locating his factory on the precise spot he erected it. The letter of Mason designated no particular acre. He or the plaintiff had a right to make the selection. That privilege seems to have been waived by the plaintiff or his *alter*

ego. The defendant then had a right to make the designation, and when once fixed fairly and honestly the selection was irrevocable. Onthank v. L. S. & M. S. R. R. Co., 71 N. Y. 196.

There was no uncertainty as to the quantity. The release was of one acre and that is all Grant assumed to take under the release. The uncertainty as to designation was cured by a fair selection made by Grant, resting upon the implied consent in the letter for him to do so.

Grant was not a stranger to the transaction. He was the equitable owner of the land. He had agreed to pay one-half the plaintiff's mortgage, and she could enforce that undertaking though not a party to the agreement. Bowen v. Peck, 94 N. Y. 86; Post v. W. S. R. R. Co., 123 id. 580; Round Lake Assn v. Kellogg, 141 id. 348-356; Thomas on Mortgages, §§ 567 et seq.

It was not expected Wilson would erect the factory. He did not so represent to Mason, but stated it was to be done by others. Wilson was interested because he was the plaintiff's mortgagor and obligor, and also had large claims upon the land. The augmentation in value would inure to his benefit. The indebtedness represented by the bond and mortgage in suit was primarily Wilson's, and he was, therefore, the one who would be likely to procure the release. But no deception was practiced upon Miss Hazard or Mason. The man who was after the release was Grant, for he was to put money into the plant, and while all lienors and parties legally interested in the land were to reap indirect benefits accruing from the erection of the factory, yet he above all others needed and solicited the release.

It was not incumbent upon Wilson to disclose the name of his principal, and even if it had been supposed he was the real party to erect the buildings, still the principal in fact would have been liable to plaintiff and could, therefore, have insisted upon the release. Ludwig v. Gillespie, 105 N. Y. 653.

Nothing could be charged against Grant, because he did not obtain the release in form at the time. Plaintiff might well refuse to execute that instrument until the factory was erected. If a formal release had been delivered by Miss Hazard July 25th, when the letter was written, she would be at the mercy of Wilson or his undisclosed principal, Grant. Their refusal to comply might involve her in litigation, but her agreement to release is as enforcible against her upon performance by Grant as an agreement to convey.

The plaintiff is entitled to the usual judgment of foreclosure, but exempting from the sale the acre described in the answer of defendant Grant.

Ordered accordingly.

CHARLES S. KENT, Plaintiff, *v.* ASA K. WEST, ISAAC S. WEST, as Committee, Etc., of ASA K. WEST et al., Defendants.

(Supreme Court, Onondaga Special Term, January, 1898.)

Lunatic — Power of Supreme Court to open his default — Answer of committee.

The fact that a County Court has acquired jurisdiction of the person and property of a lunatic does not, in the absence of laches, oust the Supreme Court of jurisdiction and power to open his default, taken in an action against him authorized by the County Court to be brought in the Supreme Court, and to allow him, by his committee, to plead therein, after the manner of an infant, or in such manner as his committee may be advised to plead.

MOTION on the petition of Isaac S. West, as committee of the person and property of Asa K. West, to open the default of Asa K. West in not appearing and pleading in the above-entitled action, and to authorize Isaac S. West as such committee to appear and plead on his behalf.

W. S. Jenney, for motion.

Wilson & Cobb, opposed.

MCLENNAN, J. This action is brought to recover for legal services alleged to have been rendered by the plaintiff, for and on behalf of the defendants.

Asa K. West is, and for many years past, has been an incompetent person, and confined in an asylum for the insane in the state of Massachusetts. The defendant Isaac S. West was duly appointed guardian of Asa K. West under the laws of the state of Massachusetts, and is now acting as such in that state.

On the 6th day of July, 1893, at the instance of the plaintiff, Isaac S. West was appointed the committee of the person and property of Asa K. West by the County Court of Erie county. He duly qualified and is now acting as such committee. Thereafter,

and on the 24th day of April, 1896, the plaintiff presented his petition to the Erie County Court, praying for an order directing Isaac S. West, as such committee, to pay plaintiff's alleged claim against the lunatic Asa K. West. The Erie County Court refused such order, but made an order authorizing the plaintiff to bring an action in the Supreme Court against the lunatic Asa K. West, and Isaac S. West as committee, to recover said claim. In September, 1896, such action was brought and the venue was laid in the county of Onondaga, and is the action above entitled. Service of the summons and complaint was made upon the lunatic by publication. He did not and could not appear or plead in said action, and made default. Isaac S. West, as committee, was duly served, and as such appeared and demurred to plaintiff's complaint, which demurrer was sustained. The defendant George F. West, who was also made a party to said action, was duly served, and has personally appeared therein.

Soon after the service of the summons and complaint upon the lunatic, Isaac S. West, as committee, made a motion at a Special Term of the Supreme Court to restrain the prosecution of this action as against the lunatic Asa K. West, on the ground that it was unauthorized, and to punish the plaintiff as for contempt for having brought such action personally against the lunatic Asa K. West. The motion, after hearing all parties, was denied by the court at Special Term, and an appeal was taken to the Appellate Division of the Supreme Court, Fourth Department, and the order of the Special Term was affirmed by that court. From that decision an appeal was taken to the Court of Appeals, and a short time before this motion was made the Court of Appeals handed down its decision, affirming the order made by the Appellate Division, and holding in substance that this action, brought against the lunatic personally, was properly brought in the Supreme Court, and could be there prosecuted to final judgment. No judgment has been entered in this action by the plaintiff against the lunatic, and the question of *laches* in making this motion is not raised.

The motion is opposed upon the ground that the Supreme Court has not jurisdiction to make the order asked for; that because the County Court of Erie county appointed the committee of the lunatic, and thereby acquired jurisdiction of his person and property, that such jurisdiction is exclusive, and the Supreme Court is powerless to direct how or in what manner an action properly brought in such court against such lunatic shall be prosecuted.

From the papers presented it would seem quite clear that to properly protect the interests of the lunatic in this action, it is necessary that he should appear in the action, and at least by answer submit his rights to the court, the same as in the case of an infant. If such be the case, must the Supreme Court invite some other tribunal to make the order necessary for the protection of the lunatic's interests, and in case of refusal by such other tribunal, proceed to render a judgment which would be inequitable and unjust? I think there is no authority for such a proposition. Not only so, but the court upon its own motion would clearly have the right, and it would be its duty in such case, to direct the committee to make appearance for the lunatic, and by answer raise such issues as might be necessary to properly protect the interests of the lunatic. The Erie County Court having acquired jurisdiction of the person and property of the lunatic, the Supreme Court is precluded from interfering, except in so far as it may be necessary for the proper conduct of an action properly brought and pending in that court. In the prosecution of such an action, at every step from its commencement by the service of summons until final judgment is rendered, the Supreme Court has jurisdiction to make any and all orders necessary to protect the interests of the lunatic. None of the numerous authorities cited by plaintiff's counsel are in conflict with that proposition, so far as I have been able to discover.

It is also urged that the default ought not to be opened because the moving papers do not show that the lunatic has a good defense to the plaintiff's cause of action. As before said, no *laches* are alleged. The lunatic does not appear or plead. He may or he may not have a defense to the alleged cause of action. He does not know and cannot tell. Under such circumstances it would seem to be proper that the plaintiff should at least be required to prove the material allegations of his complaint, and that the committee should not only be permitted but required to put the lunatic in such position before the court as to compel the plaintiff to fully present the facts of the case to the court.

Upon the facts I conclude that the default of the lunatic Asa K. West should be opened, and that Isaac S. West, as committee, should be permitted to appear for him in this action, and to plead to the plaintiff's complaint as he may be advised.

Ordered accordingly.

SARAH A. CAMPBELL and LAURA LAWRENCE, Plaintiffs, *v.* DWIGHT P. JENNINGS, as Administrator with the will annexed of the Estate of SARAH H. COATS, Deceased, et al., Defendants.

(Supreme Court, Onondaga Special Term, January, 1898.)

Powers — A power of sale passes to the administrator with the will annexed — His duty to pay legatees.

Where the will of a testatrix gives her executor an express power to sell her real estate as soon as practicable after her death and directs him to pay the proceeds to legatees named, the power passes, upon his death, to an administrator with the will annexed and imposes upon him the same powers and duties.

ACTION for the construction of the last will and testament of Sarah H. Coats.

S. Pakelinsky, for plaintiffs.

Baldwin & Magee, for defendants.

MCLENNAN, J. All the material allegations of the complaint are admitted, and there is no controversy upon any of the questions of fact. They are substantially as follows:

On September 20, 1894, Sarah H. Coats died, leaving an estate consisting of real and personal property, and leaving a last will and testament, in and by which the plaintiffs Laura A. Campbell and Laura Lawrence, and the defendants Caroline M. Mattoon and Julia Regan were named as the sole residuary legatees, and one Abner C. Mattoon was named as sole executor. The will was duly admitted to probate, and said Mattoon duly qualified as executor and acted as such until his death. Thereafter and on the 14th day of April, 1896, the defendant Dwight P. Jennings was duly appointed administrator with the will annexed. He duly qualified and is now acting as such administrator. A copy of the will is attached to and made a part of the complaint, the ninth and tenth clauses of which are as follows, and are the only parts of the will which need be considered:

Clause 9. "I hereby authorize, direct and empower my executor hereinafter named to sell all of my real estate of which I

may die seized or possessed, and to give all proper conveyances for that purpose, and his deed shall be sufficient to confer the title on the purchaser or purchasers thereof, and until sold to rent the same and collect all rents of the same for the benefit of my estate."

Clause 10. "I authorize and direct my said executor to sell all the real estate and personal property of which I may die seized or possessed, and not specifically bequeathed by the first, second, third, fourth and fifth clauses of this will, as soon as practicable after my death, either at private or public sale in his discretion, and after paying all my just debts, funeral expenses and the expense of executing this my will, to pay over the rest, residue and remainder to the legatees hereinafter named, as hereinafter devised and bequeathed."

By the subsequent provisions of the will such residue and remainder was devised to the four legatees above named, substantially share and share alike.

It is then alleged in the complaint that the plaintiffs are advised that the said ninth and tenth clauses above quoted are indefinite and uncertain in their subjects and objects, and that said ninth and tenth clauses do not confer upon the administrator with the will annexed the power to sell or rent the real estate in question. The complaint contains no other allegations, and no proof is made of any other fact. Judgment is prayed for that it be adjudged and decreed that the said administrator with the will annexed has no power or authority to sell or lease or collect the rents of the real estate in question. There is no allegation or proof that the defendant Jennings as such administrator has sold or attempted to sell, rented or attempted to rent any of the real estate in question, or that he has collected or attempted to collect any of the rents therefor, nor is there any allegation or proof that the plaintiffs or either of them have ever demanded or requested the administrator to act or refrain from acting in the premises, or that they or either of them are dissatisfied with or made any complaint as to the manner in which he has discharged or is discharging the duties of his office as administrator.

Held, that clauses 9 and 10 of the last will and testament of Sarah H. Coats, deceased, are not indefinite or uncertain. They contain plain and explicit directions to the executor named in the will to sell all the real estate of the testatrix as soon as practicable after her death, and to pay over the proceeds thereof, after having paid some minor legacies, to the legatees named, share and share

alike. No other method is provided by which the legatees can obtain any portion of the avails of such real estate, or acquire any interest therein. By the clauses in question the executor was not authorized to sell or not to sell in his discretion, but he was directed in effect to sell immediately upon the death of the testatrix, just as quick as practicable, and it is clear that unless he does sell the purpose of the will must fail, because in no other way can he distribute the proceeds of the real estate, and it is the proceeds and not the real estate that is devised by the testatrix.

Held further, that the defendant Jennings as administrator with the will annexed is clothed with the same power and authority in the premises as was the executor named in the will; that he has full power and authority to sell and convey the real estate of which the testatrix died seized, and that it is his duty so to do, and he can be compelled so to do at the instance of any of the legatees interested.

In the case of Mott v. Ackerman, 92 N. Y. 539, it is held that where a power of sale is given to executors for the purpose of paying debts or legacies, and especially where there is an equitable conversion of lands into money for the purpose of such payment and for distribution, and the power is imperative and does not grow out of the personal discretion confided to the individual, such power belongs to the office of the executor, and under the statute passes to and may be exercised by the administrator with the will annexed.

In the case of Underwood v. Curtis, 127 N. Y. 523, it is held, where executors are clothed with the power and it is made their imperative duty to sell a testator's real estate and distribute the proceeds in the manner provided by the will, the real estate will be deemed converted into personalty.

There is nothing to indicate that the administrator with the will annexed in this case desires to have the will construed, or that he is not fully advised as to his duty in the premises. There is no difficult or uncertain question of law involved, as applicable to the undisputed facts in this case.

It follows that the plaintiffs' complaint should be dismissed, and judgment is ordered accordingly, with costs to the defendant to be taxed.

Complaint dismissed, with costs.

ALEXANDER H. RODIE and WILLIAM S. RODIE, Plaintiffs, *v.* FREDERICK A. VERDON, Defendant.

(Supreme Court, Ulster Special Term, January, 1898.)

Venue — Motion to change after stipulation to put a case over the term.

Where a case, already on the calendar, is put over the term, upon the request of the defendant, upon a written stipulation executed by his attorneys that the case be placed upon the calendar for the next term, the court will not entertain a subsequent motion, made by him, that the place of trial be changed for the convenience of witnesses, as it is too late for him to repudiate the agreement upon which the case was put over the term.

MOTION to change the place of the trial of the action from the county of Ulster to that of Kings.

Evarts, Choate & Beaman, and Henry C. Quinby, for motion.

Howard Chipp, opposed.

CLEARWATER, J. The action was begun by the service of a summons on the 27th day of August, 1897, and issue was finally joined by the service of the plaintiff's reply, on the 14th of December following. The county designated in the complaint as the place of trial is Ulster. The action is to recover the value of a steam boiler, and work, services and materials furnished to the defendant by the plaintiffs. The defense is a breach of the contract and the warranty; that the breach consisted in the unfitness of the boiler and materials for the purposes for which they were intended, and contracted for, and the failure of the plaintiffs to perform the contract in accordance with its terms. A counterclaim based upon the alleged breach is pleaded. The entire transaction took place at or near the city of Hoboken, in the state of New Jersey.

The defendant resides in Jersey City, in that state, but has an office for the transaction of business in the city of New York. One of the plaintiffs claims to reside, and has his principal office in the city of Kingston in the county of Ulster. The other resides at Hoboken, where most of the witnesses live.

No demand that the place of trial be changed, save as made in this motion, has been served. On the 18th of December, 1897, the plaintiffs' attorney, who resides at Kingston, served a notice of trial for the trial term of this court then about to be held at the courthouse in Kingston on the 3d day of January, 1898. On the 23d day of December, he received from the defendant's attorneys the following telegram:

"New York, December 23, 1897.

"To Howard Chipp, Esq., 29 East Strand, Kingston, N. Y.:

"On account of Mr. Evarts' absence in Europe, will you consent to let case go over to February term.

"EVARTS, CHOATE & BEAMAN."

The next morning he telegraphed this answer:

"To Evarts, Choate & Beaman, 52 Wall street, New York:

"Case may go over to February term as you request.

"HOWARD CHIPP."

On the 29th of December he received by mail this stipulation from, and signed by the defendant's attorneys:

"NEW YORK SUPREME COURT — ULSTER COUNTY.

ALEXANDER H. RODIE and WILLIAM S. RODIE, Plaintiffs,

against

FREDERICK A. VERDON, Defendant.

CONSENT.

"It is hereby consented by the respective parties to the above-entitled action, that the trial thereof now set down for January 3, 1898, be adjourned to and placed upon the calendar for the February, 1898, term of this court.

"Dated, December 24, 1897.

_____, "Attorney for plaintiffs,

"EVARTS, CHOATE & BEAMAN,

"Attorneys for defendant."

On the call of the calendar on the 3d of January, he stated to the court that the case went over the term by agreement of counsel. On the 7th of January, notice of this motion with supporting affidavits were served.

It is contended by the plaintiffs that the affidavit is insufficient and that there is no warrant of law for changing the place of trial to the county of Kings.

The affidavit is, in my judgment, sufficient, and within the rule requiring the moving party to state what it is expected to prove by the witnesses whom he says he intends to call. Nor is there much force in the criticism that the plaintiff should have asked to have the trial in the county of New York, rather than in that of Kings. The pressure of business and the crowded condition of the trial calendars in the former county justifies the selection of the latter, and the motion would be granted, were it not for the telegram and stipulation of the defendant's attorneys. These, I think, in legal effect, constituted an agreement that the trial should be adjourned, and the cause placed upon the calendar of the following Ulster Trial Term for February, 1898.

Without discussing the course which the defendant might have pursued, it is sufficient to say that having asked, received and enjoyed a favor, it is now too late and against good conscience for him to repudiate the agreement upon which it was granted.

The motion is denied, with $10 costs to abide the event of the action, in event the plaintiffs succeed.

Motion denied, with $10 costs to abide event.

In the Matter of the Construction of the Last Will and Testament of SOPHIA ZIMMERMAN, Deceased.

(Surrogate's Court, Erie County, January, 1898.)

Will — Bequest for masses — Indefiniteness of beneficiary — Purpose not religious, within Laws of 1860, chap. 360 — A conditional legacy to an individual.

A bequest by a testatrix "to the priest of St. Mary's Church of Lancaster, New York, for which masses shall be said for the repose of my soul, and that of my husband, and all my relatives and benefactors" is not, in view of the provisions of section 1 of chapter 701

of the Laws of 1893, void for the indefiniteness of the beneficiary; nor is it a bequest for a religious purpose, within the meaning of chapter 360 of the Laws of 1860; but is, in effect, a conditional legacy, given to the individual who, at the time of the death of the testatrix, should be exercising pastoral functions at the church designated and to which he, as an individual, will become absolutely entitled upon showing that he has said the masses in question.

PROCEEDINGS upon probate of will.

H. B. Van Peyma, for executor.

Tabor & Wilkie, for John Zimmerman, contestant.

MARCUS, S. There is no dispute as to the testamentary capacity of the testatrix, or the due execution of the will.

The husband of the testatrix has put in issue, under section 2624 of the Code of Civil Procedure, first, the validity of the bequest "to the priest of St. Mary's Church of Lancaster, New York, of the sum of $600, for which masses shall be said for the repose of my soul, and that of my husband, and all my relatives and benefactors," claiming, first, that such bequest is void for uncertainty as to the trustee and beneficiary; second, that if valid, it is a bequest in fact to St. Mary's Church, and in that event the will gives the corporation named therein more than one-half of her estate, and as to the excess the same is void, and the husband takes; and third, that in the first event, the husband takes instead of the residuary legatee — the St. Mary's Church of Lancaster — named in the sixth clause of the will — since the same is in contravention of chapter 360 of the Laws of 1860, which provides that no person having a husband, wife, parent or child shall, by his or her last will and testament, devise or bequeath to any benevolent, charitable, literary, scientific, religious or missionary society, association or corporation, in trust or otherwise, more than one-half of his or her estate, after the payment of his or her debts. The third clause of the will gives and bequeaths to the St. Mary's Church of Lancaster the sum of $200 to be used towards the payment of the indebtedness of that church. The fourth clause gives and bequeaths to the Seminary and College of our Lady of Angels at Suspension Bridge, New York, the sum of $200 to be used for the support and education of poor and needy students for the priesthood. The fifth

clause gives and bequeaths to the husband of the testatrix the sum of $300.

It is conceded that the total amount of the personal estate does not exceed more than $1,700.

The first objection, that the bequest is void for uncertainty as to trustee and beneficiary, is without force, by reason of chapter 701 of the Laws of 1893, which provides that, "No gift, grant, devise or bequest to religious, educational, charitable, or benevolent uses, which shall, in other respects, be valid under the laws of this state, shall be or be deemed invalid by reason of the indefiniteness or uncertainty of the persons designated as the beneficiaries thereunder in the instrument creating the same. If in the instrument creating such a gift, grant, bequest or devise, there is a trustee named to execute the same, the legal title to the lands or property given, granted, devised or bequeathed for such purposes shall vest in such trustee. If no person be named as trustee then the title to such lands or property shall vest in the Supreme Court."

It is contended that the attempt on the part of the testatrix to have her executrix pay the priest of the church $600, for the purpose of saying masses, is, in fact, a bequest to the church; that such bequest for masses does not invest him, as an individual, with any interest in the fund, but that he would take it, if at all, as a priest of the church, for the purpose of having masses said, which is a religious purpose, and therefore within chapter 360 of the Laws of 1860, which forbids the disposition of more than one-half of an estate, as before mentioned.

The point seriously urged is that the bequest of the testatrix to the priest must be deemed to have been given to the priest for the benefit of the church with which the legatee was associated and officiating.

The legacy is given to the person who, when the will took effect, should be exercising the pastoral functions in the designated church, and though not described by name, is, nevertheless, capable of full and complete identification.

"The beneficiary under the trust is the minister officiating at the church named, for the time being. Although the particular individual is not named, he is so described that he is capable of being identified and distinguished from every other human being. There is nothing uncertain or indefinite in the description." Holmes v. Mead, 52 N. Y. 343.

I cannot conclude that a bequest to a priest individually in any way connects the church with the legatee. The same, bequeathed legally, and by the universal practice of the church, belongs to the priest, and neither the church or any superior to the priest therein can call him to an account thereof.

In the case of Van Derveer v. Kane, 25 Abb. N. C. 105, a situation is found analogous to the case at bar. The testatrix bequeathed $5,500 to her executors to be by them paid as therein directed. Five hundred dollars each to the pastors of certain Roman Catholic churches, and $250 each to the pastors of certain Roman Catholic churches, which amounts were to be paid for masses to be said in said churches. The bequest was attacked by her father as being in contravention of chapter 360 of the Laws of 1860. Bartlett, J., writing the opinion, said, "I do not regard the bequest to the pastors of the various Roman Catholic churches specified in the eleventh article as bequests to the corporations at all. They are simply legacies *to the several persons* who, when the will took effect, should be exercising the pastoral functions in the several designated churches." See Cottman v. Grace, 112 N. Y. 299-308.

"Neither is a bequest to the Roman Catholic bishop of Long Island a bequest to a corporation within the meaning of the act of 1860."

The will leaves little doubt as to whom the testatrix intended should have the $600 mentioned in the second clause of her will. In that clause she mentions the priest of St. Mary's Church, while in the third clause she makes a bequest directly to St. Mary's Church.

It may be asked, why she did not omit the word "priest" in the second clause if she intended the church to receive the money? The fact that the law designates the Rev. Mr. Scheffles a trustee of this church by reason of his being the priest named in the articles of incorporation cannot require him to account as trustee to the church for everything he may receive in the exercise of his ministerial functions. I am satisfied that no trust is created in this will, but a conditional legacy.

After masses shall have been said in accordance with the conditions annexed to said legacy by the Reverend Mr. Scheffles, he will, on showing a future performance of the condition to say masses as mentioned, be entitled to the legacy in his favor.

Concluding, therefore, that the bequest to the priest is a bequest to him, and not to the church, it follows that not more than one-half of the estate is bequeathed to corporations, and is, therefore, valid.

The paper propounded may go to probate.

Probate granted.

In the Matter of Proving the Last Will and Testament of Mary E. Rohe, Deceased.

(Surrogate's Court, Erie County, January, 1898.)

1. **Will — Undue influence.**

Undue influence cannot be assumed and must be proved; and proof that an aged woman of independent mind deputized her agent, who was also her residuary devisee and executor, to employ attorneys to draw her will by which she devised the bulk of her property to a nephew, an especial favorite of the testatrix and who had been reared by her and her deceased husband, that, after the will had been prepared by the attorneys, she had it in her possession for some time, but did not change it, and that it made some provision for ten out of fourteen of her relatives, does not indicate that the will resulted from undue influence exercised upon her by the agent.

2. **Same — Spiritualism.**

The mere fact that an aged woman is a spiritualist does not render her incapable of making a will, where there is no proof that it was the result of such influences.

Proceedings upon probate of will.

Geo. Clinton, for proponents and executor.

Bissell, Carey & Cook and Tabor & Wilkie, for contestants.

Henry W. Hill, special guardian, for infant contestant.

Marcus, S. The testimony offered by the contestants leaves for the determination of the court the sanity of the testatrix; also whether undue influence was practiced upon her.

The will and codicil of Mary E. Rohe, which are the subject of this contest, were made on the 9th of August, 1888, and the 16th of January, 1894, respectively. She was of the age of seventy-three years at the time of making the will, and of the age of seventy-nine years when she executed the codicil. Her only relatives were nephews and nieces — fourteen in all. In her will and codicil ten were mentioned to a larger or smaller extent, and four were omitted therefrom.

At the outset I shall dispose of the question of sanity, by saying that the evidence adduced has failed to satisfy my mind that the testatrix was insane. It would not be useful to consider in detail the evidence given by the contestants further than to say that while perhaps impaired mental and physical power might be reasonably concluded, it has failed to satisfy me of the want of testamentary capacity.

The evidence regarding undue influence is more troublesome, and I confess approaching this branch of the case with some diffidence, recognizing, as I do, how different views may readily be taken by different minds from the evidence in this case.

It has been uniformly held by our courts that there is no presumption against a will because made by a person of advanced age; nor that insanity can be inferred from an enfeebled condition of mind or body, providing the will is the free act of the testator, and he has sufficient intelligence to comprehend the condition of his property and the scope, meaning and effect of the provisions of his will. It has likewise been uniformly held that the burden of making out a charge of undue influence rests on the parties alleging the same — that it cannot be presumed but must be proved. The only exception is in the case of a person whose relations with deceased were such that he is presumed to have control over the judgment and will of the testator. The contestants have proceeded on this theory, and rely upon the conclusion that the evidence proved that Martin J. Nieman (a beneficiary under the will and codicil) occupied towards the testatrix a position of confidence and influence, and against him is made the charge that the will represents his mind, and not that of the testatrix; that she was wholly dependent upon him for all knowledge and action in reference to her property; that he had been imposed upon her by her husband and her husband's will; that he had charge of the real estate, and the collection of her rents, and that he dictated the amount of money she should have and the manner of its use, in short that

he was ever present; that his presence was a constant menace to her; that believing it would be impossible for him to sustain a will which would give to him all of the property of the testatrix, he wisely brought into the conspiracy Peter Geyer, who was made to be the ostensible devisee of nearly all of her property, and made himself executor and residuary legatee.

In the will of Peter Rohe (the husband of testatrix) Nieman was named as executor, and performed the duties of that office. He consulted with the deceased frequently, and attended to much of her business on the matters of insurance, taxes and the affairs of the Main street property.

I do not discover any evidence that undue, illegal or improper influence was used upon the mind of the testatrix at the time of the making of this testament, nor at any other time. Evidence must be given of some act of persuasion, solicitation or controlling power of mind, will or judgment whereby the testatrix was forced or induced to dispose of her estate in a manner different from that which she would have elected had she been a free agent. The evidence not only does not disclose that he had any influence over her, but on the contrary indicates that the testatrix had a will of her own, and that her own ideas prevailed in direct opposition to Nieman's wishes. The only evidence given on this point shows that Nieman asked the testatrix to give to him her Main street property, which she refused, and in speaking of the incident to one of her friends remarked that "She was not such a fool."

There is no suspicion of undue influence to be taken from the fact that Nieman is a devisee. The great bulk of the property goes to a nephew — Peter Geyer — who was reared by the testatrix and her husband, who was a special favorite, while almost all the remaining property goes to the relatives of the testatrix, and of her deceased husband.

The evidence would hardly warrant holding that the testatrix was dependent upon and subject to the control of Nieman to the extent of invoking the principle of law that the burden is cast upon him of relieving himself of the suspicion, and showing either by direct proof or circumstances that the transaction was free from fraud or undue influence, but that the testatrix acted without restraint or coercion, because of his devise. Nor do I think, taking all the circumstances together, a case was made which required explanation that the will expressed the intention of the testatrix. There is nothing that appeals to my mind as unjust or eccentric

about the provisions of this will; nor do I think the relations existing between Nieman and the testatrix, as shown by the testimony, raise any presumption of undue influence. The most that can be said of it, perhaps, is that the relation was confidential, but was not fiduciary in the ordinary sense, and the evidence does not show that the testatrix was in Nieman's power or control, or that the relation existing between them could be construed as raising any presumption of undue influence.

The bequest of the bulk of the property of the testatrix to Peter Geyer does not impress me as a part of any conspiracy. By the codicil the will was changed so as to give Peter Geyer a fee in the Main street property, instead of a life estate, with remainder to his children. He was brought up by Mr. and Mrs. Rohe. He was their son in the affection of a childless couple. If motive were at all necessary for a court to comprehend, it would be satisfied by this disposition, and be able to understand the feeling which prompted it.

It is not sufficient to establish that a person has the power unduly to overbear the will of the testator. It is necessary also to prove that in the particular case it was exercised, and that it was by means of the exercise of that power that the will, such as it is, has been produced.

The testimony offered by the contestants relating to the spiritualistic seances, when closely analyzed, seems to show nothing but the fact that the testatrix was a believer in spiritism. There is an entire absence of testimony as to the influence of spiritism upon the particular disposition of her property as made by her. It must be conceded that the evidence proves conclusively that the testatrix was a believer in spiritism, but it in no way shows that her visits amongst the people with whom she came in contact at the times the seances were held, or the messages received by her from interested or disinterested persons, affected by the same belief, in any way induced her to make any disposition of her property in any particular or specified way, or in any way. It may be that some influence, by means of these seances, was obtained over her, but by whom, and to what purpose, is not shown. It may be that all these spiritualistic seances and messages were a scheme of deception and fraud, but there is no proof in the case which ought to support a judgment that such was the fact. There is enough perhaps to raise a suspicion, but far from sufficient to produce conviction. Circumstances raising a suspicion, but not producing conviction, ought not to justify a court in denying probate.

There is no proof tending to show what influence the spirits or the mediums exercised over the testatrix in making her will, or their influence upon her generally, except, perhaps, the fear expressed by herself of being alone because of them. Such statements, of course, are competent to show her condition of mind, but not to prove undue influence against either persons or spirits; for the purpose of proving undue influence, they are without the least force. The will of one who believes in spiritism is not on that account void, nor is it evidence of mental unsoundness. It must be shown, in order to avoid a will on that account, that it was the offspring of such belief. The contestants have urged that it is not the policy of courts to "strain" after probate of a will. While that is true, the converse of the proposition is equally true — that courts should not strain to refuse probate. The will of the testatrix was made in 1888 and the codicil in 1894, and upon the execution of both instruments they were handed to her. Nieman went to the office of Clinton & Clark, and stated that Mrs. Rohe wanted them to prepare her will. They were the same attorneys who had transacted her husband's business, and likewise transacted business for her after her husband's death. Nieman was advised by the attorneys that he should bring to them a statement of what the testatrix desired, and a will would be prepared by them. This he did. A draft was made, and the same submitted to the testatrix. The will was then prepared as now presented, an appointment made with the testatrix, and the formalities of the execution were accomplished. Both remained in her possession until about the time of her death, thus giving her full opportunity to examine them, or to have them read to her, if she so desired. It seems hardly conceivable that the contents of the will should have been unknown to the testatrix, as has been urged by the contestants.

I am impressed with the great weight which is and should be given to the right which the law gives to the owners of property to dispose of it by will, and the moderate capacity required for the exercise of that right, and the aid they may invoke from others in giving order and legal form to their wishes, without subjecting them to the charge of fraud and undue influence.

I am satisfied that the testatrix had testamentary capacity; that no undue influence or fraud was practiced upon her; that the will and codicil represent the wishes of the testatrix, and should be admitted to probate.

Decreed accordingly.

In the Matter of the Estate of ELBRIDGE G. SPAULDING, Deceased.

(Surrogate's Court, Erie County, January, 1898.)

Transfer tax — Gifts inter vivos.

Gifts made by a testator, aged eighty-four years, more than two years before his death, to each of his three children, of securities amounting to half a million dollars, followed by their subsequent absolute possession and custody of the securities, their receipt of the dividends which subsequently accrued, the increased assessment of two of the donees for personalty and a large reduction in that of the testator, are not within the provisions of the Tax Law (Laws of 1896, chap. 908, § 220, subd. 3), enacting that a transfer by a "gift made in contemplation of the death of the * * * donor, or intended to take effect, in possession or enjoyment, at or after such death" is taxable.

APPEAL from an order fixing the transfer tax.

Moot, Sprague, Brownell & Marcy, for appellants.

Percy S. Lansdowne and Timothy E. Ellsworth, for State Comptroller.

Hamilton Ward, Jr., Transfer Tax Assistant District-Attorney, for the County Treasurer of Erie county.

MARCUS, S. This is an appeal from an order entered herein fixing the transfer tax.

The testator was born on the 24th day of February, 1809, and at the time of his death was a widower with three children, who are people of middle life. He had never been sick nor had a doctor until the middle of March, 1897, and seems to have transacted his business personally until that time. He had no disease, and died of old age. One morning in November of 1895 the testator called one of his sons into the banking office, and told him he had got to be a "pretty old man," or a "very old man," and his estate had got to be a burden to him; that he intended to give it ultimately to his children, and purposed to give some of it now. The son took the securities given to him by his father for the benefit of the children, and locked them up in a box where his

father formerly kept them. This box was then labeled with the names of all three children and kept in the same place until the fall of 1896, when it was transferred to the safe deposit vaults of the Marine Bank. From the time of the gifts to the time of his death the testator never saw the securities, or had anything to do with them. The box was then taken in the name of the donees, who had the combination, so that any of them had access to the box containing the securities. The interest coupons payable on and after the 1st of January, 1897, were collected by and paid to the beneficiaries of the gift. The total amount of the gifts in question amounted to $1,500,000, and were given on two occasions. The first gift amounted to $1,038,900, and the second gift such an additional amount as to make the gift to each of the three children $500,000. After the gifts mentioned, the two sons were assessed on the city assessment-rolls $30,000 each, and the assessment on the father's estate reduced $100,000. Some of the securities were sold by the donees before the testator's death. The testator left a will bequeathing the bulk of his estate to the three children mentioned, which will disposed of upward of $3,000,000.

This appeal is to determine the taxing of the gifts mentioned.

It is contended on the part of the appellants that the gifts made by the testator were valid, absolute and sufficient to transfer all titles to the securities in the donees, thereby becoming their property. That the testator's estate has no right or claim to the same whatsoever, and they are, therefore, not taxable as assets of the estate in the hands of the executors.

It is urged on the part of the estate that the gifts were "in contemplation of death."

Pennsylvania and Illinois have provisions similar to the New York laws for a tax on transfers made "in contemplation of death." It became part of our laws by chapter 215 of the Laws of 1891, and so far has had no judicial interpretation which I have been able to discover. This provision of the statute is, therefore, novel.

From the testimony taken before the appraiser I am satisfied that the gifts under consideration were not gifts *causa mortis*, since they had not all the necessary elements to so characterize them. The discussion of the question, therefore, must determine whether gifts *inter vivos* are included within the meaning of the act.

It is conceded that the statute contemplates gifts *causa mortis*. It is not claimed on the part of the state that the property transferred, and which is now in question, was such a gift.

Gifts *causa mortis* are of a mixed character; they partake of the character of gifts *inter vivos* from delivery, which is essential to their validity; and yet this single feature, as assimilating them to ordinary donations, merely characterizes the mode of the thing and not its type and quality. Bloomer v. Bloomer, 2 Bradf. 346.

It being conceded that the gift was not *causa mortis* nor a gift intended to take effect in possession or enjoyment at or after death, the question must be determined whether a gift *inter vivos* — the donor dying weeks, months or years thereafter — can have "contemplation of death" attached to it to defeat, in part, the purpose of the gift and bring it within the Transfer Tax Act, or reversely defeat the Transfer Tax Act and free the gift from the tax, when the testimony shows an absolute and irrevocable gift; whether old age, *per se*, makes all gifts convertible into gifts "in contemplation of death" for the purposes of taxation, irrespective of any intention on the part of the donor.

It must not be forgotten that alienability is one of the essential qualities of property, and allows the owner to control its disposition and freely give his property to whomever he pleases, limited perhaps to the right of creditors.

This is a special tax law. Matter of McPherson, 104 N. Y. 317.

All such laws must be clear and unmistakable in their meaning, for a citizen cannot be subjected to special burdens without a clear warrant of law. Matter of Eysaman, 113 N. Y. 78.

Determining as I have that the testimony has failed to satisfy me that the gift was in contemplation of death, or *causa mortis*, it must now be considered how far, if at all, this law applies to gifts other than *causa mortis*. This brings up the question squarely, and at once suggests that if another view is taken, so that all gifts will be comprehended by the Transfer Tax Act — if it be intended to cover all gifts made *inter vivos* — what form of testimony will be necessary from which a fair conclusion may be drawn that will protect administrators from being unjustly obliged to subject their trusts to the succession tax on the one hand and the state from receiving its due on the other. All gifts are *inter vivos* except those *causa mortis*. A gift *causa mortis* differs from a gift *inter vivos* not only with reference to the condition of death but in further being subject to revocation by the donor himself, and requiring that the donee shall actually survive him. The line is often dim which distinguishes gifts *causa mortis* and

those, though *inter vivos*, having allied to them some of the other's elements.

What form of testimony will mark the line of the beginning and end of that unfailing thought "in contemplation of death?"

Death is the subject of much contemplation by all who reach maturity, when about to dispose of any considerable property to their next of kin. If other gifts than *causa mortis* are included in the statute, what cases does it cover? What controls? Is it the age of the party? The condition of his health? The casual remark made by him at the time? Why not include advancements given months or years before decease, though psychologically given in contemplation of death? How could the tax be collected?

A special statute passed for the purposes of taxation should not have such a forced construction.

The original act (chapter 483 of the Laws of 1885) and all amendments thereto down to 1891 refer only to property passing by will, or intestacy, or transfer by deceased, "made or intended to take effect in possession or enjoyment after the death of the grantor or bargainor."

There is no material change in the act of 1891, except the words "the gifts made in contemplation of death," etc.

It has been held that the tax imposed by the act of 1885 is not a property tax, but a tax under the right of succession under a will, or devolution in case of intestacy. Matter of Swift, 137 N. Y. 77.

The jurisdiction for the collection of the tax is conferred on the Surrogate's Court, the jurisdiction of which is confined to decedent's estates.

The payment of the tax has always been imposed on the executor, administrator or trustee, though likewise on the property transferred. They are made personally liable for the payment of the same until the tax is paid; nor are they entitled to a final settlement of an estate until such tax is paid. They are empowered to sell the decedent's property to pay the tax.

The surrogate shall appoint an appraiser to "fix the fair market value (at the time of the transfer thereof) of property of persons whose *estates* shall be subject to the payment of any tax imposed by this article." Tax Law, § 230.

The provisions of the law under discussion relate exclusively to the method of procedure for determining the market value of the property of *decedents* and the succession tax to be paid thereon.

It is silent as to any provisions for appraisal or determination of a tax on a gift *inter vivos*.

If the property which is now sought to be relieved of the tax imposed by the appraiser had been given by the testator to collateral relatives or strangers not named in the will, how could it be reached to pay the tax? From what time would the tax be due? What penalties would it carry by way of interest? How would it be appraised? As of what date is its value to be appraised? Could the executors be held responsible for what never came to their possession? Surely it could not be taken from the beneficiaries under the will. It seems clear that the statute is one based on the theory that those having in charge the estate of a decedent should pay taxes on the property in their hands and under their control.

Reading the statute as a whole is seems that it has to do with death and dead men's estates, and that it does not contemplate reaching property transferred by gift or otherwise among the living.

The statute is inadequate in its provisions for reaching property not in process of distribution, but which has passed into the hands of donees of gifts *inter vivos* and is beyond the reach and control of those in charge of the administration of an estate.

Gifts apparently *inter vivos* may nevertheless have attached to them such conditions and circumstances that clearly bring them within the statute, and I think a fair construction of this act would obviously cover gifts *inter vivos* where a party is *in extremis*. That perhaps is the extreme to which the act could be stretched and yet kept within the rule which requires that the state shall show clear warrant for taxing property of the citizen under this special law.

Gifts *inter vivos* intended to take effect at or after death are comprehended by this act and really by the words of the statute, "in contemplation of death."

The Court of Appeals in Matter of Seaman, 147 N. Y. 69, declared that the statute reaches all gifts *causa mortis*, and it would seem gifts *inter vivos*, which are made *in extremis*, might likewise be included.

It has been earnestly urged on the part of the state that unless it is held that the gifts, as made by this testator, are declared to be "in contemplation of death," the state will lose thousands of dollars, since anyone on the eve of death can transfer property without condition and defeat the purpose of this act.

The testator was at the time of these gifts a very wealthy man, and it must be apparent, not alone from the evidence, but the gifts themselves, that he desired to be rid of the burden of his estate, in part at least. If the transfers were made with the intention to deprive the state of the tax due on the property of which he might die possessed, these gifts might well have been of the greater part of what he possessed without retaining upward of $3,000,000. He was a man advanced in years and of few personal wants, so that these millions were unnecessary to him. He could readily have defeated the statute without any inconvenience to himself.

If this form of disposing of property becomes disastrous to the purposes of the statute, the legislature can easily remedy it by arbitrarily fixing a time from which all gifts may be declared void in so far as relieving them from the tax in question.

In Louisiana, "No donations *inter vivos* or *causa mortis* can exceed two-thirds of the property, if the disposer having no children leave a father, mother or wife."

There is no clear warrant in the law for taking $15,000 from the estate of the testator to pay a tax upon property which had passed beyond the control and custody of the testator irrevocably long before his death.

If all the children of the testator, after receiving the gift of $500,000 each, had died before the testator, there would be no question but what it would have been subject to the tax. Could it be claimed that after their estates had paid the tax on this property it could again be taxed as a part of the estate of the father, he surviving the children? This seems to be a fair test.

So far as the reported cases throw any light on this subject they seem to sustain the claim that the statute applies to gifts *causa mortis*, or dispositions of property, like trusts or settlements, intended to take effect after death; but the statute does not seem to warrant the reaching of gifts *inter vivos*.

Manifestly there can be no warrant for taxing the property of the children, and yet regard it as a part of the estate of the testator.

I am satisfied that the statute does not cover the case presented, and that the testator had no interest in the $1,500,000 which he gave to his children long before his death, and, therefore, the executors cannot be made to pay a tax within the statute, or any decision under it.

The decision in the Matter of Birdsall, 22 Misc. Rep. 180, by the surrogate of Chautauqua county had to do with a gift *causa mortis*, as I read it. What is said, therefore, of gifts *inter vivos*, is *obiter dicta* to the Birdsall case.

The reason underlying the law, the reasonable construction of the statute itself, the circumstances of this case, and every consideration that should weigh in rendering a judgment between the state and the executors of an estate, alike determine this case in favor of the executors.

So much of the appraisers' report as taxes $1,500,000 is hereby set aside.

Decreed accordingly.

In the Matter of the Application of MARY E. LAWTON et al. to Lay Out a Highway in the Town of Ashford, Cattaraugus County, and the Assessment of Damages Therefor.

(County Court, Cattaraugus County, January, 1898.)

Highways — Public highway laid out to benefit an individual.

Where the main object of a proceeding, taken ostensibly to lay out a public highway, is to furnish access to the lot of an individual, not reached at present by any highway and which is the terminus of the one proposed, the report of the commissioners should be set aside and the individual be remitted to her right to apply for a private road, under sections 106 et seq. of the Highway Law.

MOTION by petitioners to confirm the report of commissioners appointed to determine the necessity of laying out a proposed highway and to assess the damages.

A. J. & J. Knight, for petitioners.

E. A. Scott, for Carl Burns, landowner and taxpayer.

A. B. Neff, Supervisor of the town of Ashford.

J. L. Murphy, taxpayer of the town.

KRUSE, J. The commissioners appointed in this proceeding certify and report that the proposed highway in their opinion is

necessary and proper, and assess the damages occasioned thereby. They have filed their report to that effect, and the petitioner now moves for its confirmation. This is strenuously opposed on behalf of Carl Burns, one of the landowners through whose lands the proposed highway is located, and also by the supervisor of the town and by J. L. Murphy, a taxpayer of the town. While the commissioner of highways does not seem to have opposed this proceeding in its inception, he now also asks that the supervisor and Mr. Murphy appear for him and object to a public road.

Since the enactment of the Highway Law in 1890 the procedure for determining the questions for laying out or discontinuing highways and the assessment of damages incident thereto has been substantially changed. Under the former practice, when the owner of the land did not consent, a jury was required first to certify to its necessity; from this an appeal might be taken to the County Court, and the same question was again determined by three referees. The damages were then assessed by three commissioners appointed by the court, and, an appeal being taken, the same question was again determined by a jury from another town, so that these questions might be litigated before two juries, three referees and a commission, practically four distinct tribunals. By the revision of the Highway Laws these questions are now determined in a proceeding before commissioners, subject to a review by the County Court, or the judge if the court is not in session.

The Highway Law does not seem to point out very clearly the questions which may be passed upon in reviewing the decision of the commissioners nor the extent or scope of such review, except as it can be inferred from the character of the proceeding, the general language of the statute, and its scope and purpose.

In People ex rel. Hanford v. Thayer, 88 Hun, 136, in the late General Term of the Supreme Court, Fifth Department, Judge Ward in writing the opinion of the court reviews quite fully the statute under consideration, and in referring to section 89 states that the language "seems broad enough to empower the County Court, upon a motion to confirm or vacate, to review all the proceedings in the laying out of the highway after the granting of the order appointing the commissioners whether those proceedings relate to the merits of the application or otherwise. In other words, the County Court can review any question that this court can upon this writ." The writ referred to was a writ of *certiorari;*

the court holding that review by *certiorari* was not applicable to the proceeding.

While I have great confidence in the judgment of the commissioners who heard the testimony and viewed the premises and have become familiar with the surroundings, yet I am not satisfied that they may not have committed an error in making their determination. It appears by the testimony returned by the commissioners that Mary Lawton, one of the petitioners, is the owner of twenty acres of land which is entirely cut off from any highway. This was a part of a larger parcel at one time owned by one Canfield, who conveyed the larger part of the premises to Williams, reserving the twenty acres which was afterward acquired by Mary E. Lawton, the petitioner, she paying therefor the sum of $300. The timber has been taken off of the lot, and the testimony shows that the premises are now worth $300 and will be worth $500 if the proposed road is laid out and opened. It does not appear whether the present owner of the twenty acres has any right of way across the adjoining lands, nor do I consider it very important, for it must be remembered that this proceeding is for the purpose of laying out a highway or public road and the private interest of the present owner of the twenty acres, as well as that of the two other petitioners who to some extent will be benefited and whose farms adjoin a public highway, is merely incidental to the main purpose. I fear that the commissioners in making their determination have placed undue importance upon the necessity of these individuals, and particularly Mary E. Lawton, rather than the necessity arising from the absence of a public highway. I do not mean to intimate that it is not entirely proper that the private interests should be considered, but, as I have already stated, it seems to me that it should be only a mere incident and that the primary object and purpose of the proceeding should not be lost sight of. Merely because these petitioners would be benefited by this road furnishes no just ground for denying the application. But it should not be made paramount, and in view of the fact that witnesses testified before the commissioners as to the necessity of the road, which it seems to me is largely a conclusion, and it appearing that this road is to end at this twenty-acre lot, and the other facts and circumstances tending to show that the real issue made before the commissioners was as to the necessities of private owners rather than the public, I am quite impressed with the suggestion that the determination was largely based upon the erroneous belief that it is the duty of a town to afford means of in-

gress and egress to isolated or inaccessible lands. Such is not the law, and this seems quite evident from the statute under consideration, for it is to be observed that section 106 of the Highway Law provides for making application for a private road, and the subsequent sections indicate the procedure to be adopted. Section 117 requires the payment of the damages by the party for whose benefit the road is laid out, unless the necessity was occassioned by the alteration or discontinuance of a public highway, and in that case the damages shall be refunded and paid by the town to the applicant.

It seems to me that the facts and circumstances, as I have been able to obtain them from the report and testimony returned, would entitle the petitioner to a private road, but I am not satisfied that the commissioners correctly applied the rule of law applicable to the laying out of a public highway. I may entirely misapprehend the situation, but from the consideration which I have given the matter I think that there should be a rehearing. At the time when the commissioners were appointed no one appeared in opposition, and it was not expected that any contest would arise over this matter; since then the controversy has become quite earnest, and in view of the fact that the questions involved are somewhat of a legal character, I think that some one in the active practice of the law should be appointed upon the commission; otherwise I should deem it unadvisable to make any change in the commission.

The report and decision of the commissioners is vacated and set aside, and a rehearing is ordered before commissioners to be appointed.

Report vacated and rehearing ordered before commissioners to be appointed.

GEORGE C. PULVER, Respondent, *v.* JOHN ESSELSTYN, Appellant.

(County Court, Columbia County, January, 1898.)

1. Services — Farm worked on shares — Acts usually gratuitous — Express promise.

Where a tenant, who has agreed to work a farm on shares, claims for services of a nature usually rendered gratuitously by one in his situation he must show an express promise upon the part of the owner to pay him therefor, or must prove circumstances from which such a promise can be implied.

2. **Same — Statute of Limitations — Mutual accounts.**

The tenant cannot save his demand from the bar of the Statute of Limitations, upon the theory of an open mutual account existing between the parties, by proof of an account which does not show that the owner was indebted to him in any manner whatever, except for an unknown quantity of hay which the tenant marketed, as to which he testified that he, of his own motion, gave the owner "credit on account" for his share and which might properly be deemed to have been a mere payment by the tenant of his debt to the owner.

3. **Same — Presumption that a payment is in full.**

A payment made by a debtor to his creditor will be presumed to be in full; and if the debtor has evidence to the contrary and fails to produce it, he must submit to the presumption, although unfavorable to his case.

APPEAL from a judgment of the Justice's Court.

John L. Crandell, for appellant.

G. K. Daley, for respondent.

LONGLEY, J. The plaintiff brought his action upon, to say the least, a very stale demand.

Under an oral contract he worked the defendant's farm on shares from April, 1890, to April, 1891. In December, 1896, without, so far as the record shows, having ever made any previous demand, he sued the defendant in Justice's Court to recover $105.97, alleged to be due him for services outside of his contract, rendered by him to defendant during the year he worked the farm, and for certain products of the farm, which he claims were had by defendant in excess of his share. He recovered a judgment for the whole amount of his claim.

Upon the trial, plaintiff testified that, by his contract, he was to do all the work of the farm. The services for which he now, at this late day, charges, are mainly for cleaning out the stable in which his own and defendant's horse were kept, occasionally feeding defendant's horse, milking defendant's cow sometimes when defendant was away or sick, bringing defendant's pigs, taking care of his hogs, and plowing and making his garden.

I think it may fairly be held, as claimed by the defendant, that all these services the plaintiff was bound to render under his con-

tract. But if not, then I think he was bound to show that these small neighborly services were not intended by him nor accepted by defendant as mere acts of kindness for which no charge was to be made. I think, especially in an action so long delayed, he should have shown either an express agreement by the defendant to pay for them or some circumstance from which such an agreement might fairly be implied. I think he failed to show either. None of the services, so far as appears, were rendered upon defendant's request. The law does not imply a promise to pay for every volunteered service, even when rendered with the knowledge of the beneficiary, but will rather assume, especially as between persons sustaining towards each other such relations as existed between these parties, that such services were intended to be gratuitous. Davidson v. Westchester G. L. Co., 99 N. Y. 558; Potter v. Carpenter, 76 id. 157.

The plaintiff, in order to save a large part of his claim from the Statute of Limitations, sought to establish, under section 386 of the Code of Civil Procedure, a mutual open account with reciprocal demands subsisting between the parties throughout the entire year, from April, 1890, to April, 1891, or at least to a period beyond December 21, 1890; the latter date being six years prior to the commencement of his action.

Before the trial was commenced the plaintiff filed a bill of particulars of his claim. The bill of particulars shows nothing to defendant's credit, and nothing to indicate any mutuality of account.

Nor does anything appear in the pleadings or testimony to indicate that plaintiff was indebted to defendant in any sum whatever, unless possibly for some unknown quantity of hay which plaintiff testified that he purchased of defendant sometime in April, 1891, and "credited to him on account."

The plaintiff did testify that, during the year he was on the farm, he had some things of defendant, but he does not tell what they were, nor say that he did not pay for them, or that, at the time the action was brought or tried, he was indebted to defendant on account of them. All that appears in the case against plaintiff's claim by way of mutuality of account is his own testimony that he was drawing hay all winter off the farm and selling it to Bristol Brothers at $12 a ton, that he gave defendant credit for his half, but has never had any accounting or settlement with the defendant on account of the proceeds of such sales, and the hay purchased by plaintiff of defendant in April, 1891. As plain-

tiff's claim did not purport to be a balance of account, and as no credits appear upon the plaintiff's bill of particulars, and as he did not state any way in which he had ever otherwise credited defendant with his share of the sales of hay, or with the value of the hay purchased in April, 1891, it is, to say the least, difficult to see how the justice could render judgment for the full amount of plaintiff's claim, without allowing anything for the hay. How much money plaintiff had received for the hay was a matter peculiarly within the plaintiff's own knowledge, and unless he saw fit to disclose the amount he was owing to the defendant on account of it, or rather, how much his bill was, or should be, reduced by the amounts he had credited to defendant on account of it, I think the presumption arises that it was enough to extinguish the whole of plaintiff's claim.

A payment made by a debtor to a creditor will be presumed to be in full, unless the contrary appears. Boyd v. Weeks, 5 Hill, 395; New York Dry Dock Co. v. McIntosh, id. 290.

When a party has evidence which he can produce and fails to produce it, he must submit to the presumption that it is unfavorable to his case.

In Wylde v. N. R. R. Co., 53 N. Y. 156, it was held that "Where one party to an action, knowing the truth of a matter in controversy and having the evidence in his possession, omits to speak, every inference warranted by the evidence offered will be indulged in against him." But it is not necessary to hold that there was a legal presumption here, binding upon the justice, which was sufficient to extinguish plaintiff's entire claim. I am quite clear that plaintiff's indebtedness to defendant for the latter's share of the proceeds of sales of hay belonging in part to defendant, as claimed by plaintiff, was not enough to impress upon plaintiff's account against defendant the character of a mutual open running account, within the meaning of the law, so as to enable the items of plaintiff's account which accrued within six years, if there were any, to draw after them the whole account, thus exempting the items outside of the six years from the operation of the Statute of Limitations.

The hay sold to Bristol Brothers was not furnished by defendant to the plaintiff. The plaintiff had the right, under his contract, and it was his duty, to market the hay. That which came into his hands, therefore, belonging to the defendant, was money, and this could only enter into the account between them

as a payment by defendant upon any sum which he was owing to plaintiff. This does not create a mutual account.

"Payments do not enter into the account but are at once applied to reduce it." 3 Wait's L. & Pr. 794.

Of course a payment actually made within six years by a debtor on account of an existing claim may serve to keep it alive or even revive it if the statute has already run. But this is under another section of the Code (Code of Civil Procedure, § 395), and the payment must be made by the debtor under such circumstances as evidence his intention to recognize the debt, and acknowledge a balance remaining due upon it. Crow v. Gleason, 57 N. Y. St. Repr. 583; Adams v. Olin, 140 N. Y. 150; Crow v. Gleason, 141 id. 493.

A revival cannot be accomplished by the act of the creditor alone. Camp v. Smith, 16 N. Y. St. Repr. 268.

As I have said, I do not think the crediting of the proceeds of the hay by plaintiff without any authority from defendant, as money paid by defendant on account, made a mutual open account, with reciprocal demands between the parties.

I think that all the items of plaintiff's bill of particulars which were for goods furnished or services rendered prior to December 20, 1890, were outlawed and barred by the Statute of Limitations.

The items of plaintiff's bill of particulars which, as therein entered, appeared to have accrued within six years prior to the commencement of the action, are thus dated, "1891, 397 lbs. of hay out of hop-house, $12 per ton, $1.19. Feb. 1, 500 lbs. of hay out of hop-house, $12 per ton, $3. 7 bushels of corn out of corn-house, .60, $4.20. Taking care of his hogs, $5. Milking his cows, $2. Taking care of his horse 11½ months, $25. Use of stable and wagon-house, $10."

As to these seven items the testimony shows that the stable and wagon-house were reserved to the use of defendant, in the contract. He was, therefore, not liable for their use. The entry itself shows that the charge for taking care of defendant's horse covered the whole time plaintiff was on the farm. And the plaintiff testified that he milked the defendant's cows "through the summer." So that these items, although so entered upon the bill of particulars as to appear to have accrued subsequent to December, 1890, were in fact for services mainly, and as to the cow wholly, rendered prior to that date. But as to both these items and also the charge of $5 for taking care of defendant's hogs, I

have above expressed the opinion that plaintiff failed to show that defendant was legally indebted to him on account of either, for the reason that even if they were not included in the contract, which required the defendant to do all the work of the farm, they were not rendered upon plaintiff's request, nor under such circumstances as creates an implied promise to pay for them.

There remain the items of $4.19 for hay and $4.20 for corn. In all $8.39, for which, at the time of the trial, defendant appears to have been indebted to the plaintiff. I think it cannot be called a violent presumption to assume that if plaintiff was drawing off hay all winter and selling it at $12 per ton, as he testifies, and has never accounted for the proceeds, that he must at least be owing the defendant as much as $8.39. If this presumption does the plaintiff any injustice he has no one but himself to blame, for he knew, or certainly should have known, how much money he had in his hands belonging to defendant, and he cannot complain if the fact that he admitted he had some, but failed to disclose how much, is construed most strongly against him. Wylde v. N. R. R. Co.; *supra.*

Having shown payments upon the amount of his claim, it was his duty to show that there still remained a balance due him, and how much that balance was. Having failed to do this there was no legal basis for a judgment in his favor. Fox v. Decker, 3 E. D. Smith, 150.

I think the judgment must be reversed.

Judgment reversed, with costs.

WALES B. LOUNSBURY, Appellant, *v.* FRANKLIN DUCKROW, Respondent.

(County Court, Onondaga County, January, 1898.)

1. Action by insurance agent for premiums — General denial — Right to sue — Implied authority to collect premiums.

Where it appears, in an action brought by an insurance agent to recover a premium alleged to be due him, that his company in a foreign state issued to the defendant, through him, a policy which was handed to the defendant by a broker who collected and receipted for the premium and subsequently absconded, the interposition of a general denial puts in issue the right of the plaintiff to sue and also

raises the question whether the plaintiff, by intrusting the policy to the broker, had not given him implied authority to collect the premium.

2. Same — Right of agent to sue.

An agent cannot, merely as such, sue to collect moneys due his principal and where he proves no assignment nor right of subrogation, his action cannot be maintained.

APPEAL from a judgment from the Municipal Court of the city of Syracuse for $9.70 costs in favor of the defendant.

This action was brought to recover the premium on an insurance policy. The answer was a denial and payment. It appeared, or was assumed upon the trial below, that the plaintiff was the agent in Syracuse for The Germania Fire Insurance Company, of Pittsburg, Pennsylvania. On December 1, 1896, the plaintiff issued from his office a policy of fire insurance in said company, insuring for the period of one year property belonging to the defendant, the premium charged for such insurance being $25, for which this action was brought. The policy was obtained from the plaintiff by one Walter Irving Chase, an insurance broker. After the delivery to the defendant of the policy by Chase, he collected the premium sued for, giving his receipt therefor, and subsequently absconded. The learned judge who rendered judgment below stated in a memorandum that the ground upon which judgment was rendered was that the plaintiff was simply an agent and had no right to sue in his own name to recover a debt due as principal.

Carley & Turner, for appellant.

Goodelle & Nottingham (W. F. Hodge, of counsel), for respondent.

Ross, J. There is no evidence bringing the plaintiff within the rules permitting an agent to bring an action in his own name. Story on Agency, § 393.

The evidence of the plaintiff shows, or tends to show, a liability upon the part of the defendant to the insurance company, but does not, in any way, by proof of the right to subrogation or by assignment, connect the plaintiff with such right. It is claimed by the plaintiff's attorneys that, by not specifically pleading that the plaintiff was not the real party in interest, or demurring, that such objection is waived.

I think the right of the plaintiff to recover was challenged in every particular by the answer of a "general denial," which, as is stated in one of our text-books, "requires the plaintiff to prove every fact which is essential to his cause of action. It puts in issue every material allegation in the complaint, and, therefore, imposes upon the plaintiff the burden of substantiating every part of his case by legal competent evidence. And the effect of the denial is not confined merely to putting in issue all the facts which are directly alleged in the complaint, for it also puts in issue every application or conclusion of law which arises out of the facts stated therein." 2 Wait's Law and Practice, 651.

The provisions of the Code of Civil Procedure (§§ 498 and 499) requiring the defendant to take advantage of or specifically to plead a defect of parties or, if not so pleaded, declaring that the same is waived, assume, if such objection is not taken, a right of action in the plaintiff in the capacity or in the form in which it is brought. They do not change the rules of pleading so as to require a specific denial as to each fact constituting plaintiff's case, which would be no more comprehensive than a general denial, much less do these provisions supply a defect in proof.

I also think that the case squarely presented a question of fact for the trial court as to whether the broker was the agent for the insured or the company; whether, from the course of dealings between the broker and the plaintiff before the transaction in question and intrusting him with the policy, the broker had not implied authority to collect the premium in this case. At least it cannot be said, as a matter of law, that he did not have such authority. Greenwich Ins. Co. v. U. D. Co., 8 N. Y. St. Repr. 353.

And the trial judge having rendered a judgment in favor of the defendant is conclusive not only as to every matter proved but as to every matter embraced in the pleadings. Lorillard v. Clyde, 122 N. Y. 41.

A verdict settles in favor of the prevailing party every question of fact litigated upon the trial. Wolf v. G. Ins. Co., 43 Barb. 400.

The opinion of the learned judge is no part of the record, and is only valuable as explaining the reasons of the judge for his judgment. Agan v. Hey, 30 Hun, 591; Robinson v. N. Y., L. E. & W. R. R. Co., 64 Hun, 47, 48.

Judgment affirmed, with costs.

Judgment affirmed, with costs.

HENRY M. HENNION, Plaintiff, *v.* DAVID W. KIPP, Defendant.

(County Court, Rockland County, January, 1898.)

Undertaking — Construction in favor of a surety — Estoppel.

An undertaking given on an appeal for a new trial in the County Court, which binds the sureties, in a certain penalty, to pay the "amount" of a judgment and interest recovered by the party successful in Justice's Court, "or so much thereof as may remain unsatisfied in case said appeal shall be dismissed, or if judgment shall be rendered against" the appellant "and execution issued thereon shall be returned wholly or partly unsatisfied," cannot be construed to make a surety liable to pay any more than the judgment and interest; nor can the fact that the respondent treated the undertaking as a stay, when it was insufficient for that purpose, entitle him, upon his recovery of a much larger sum upon the new trial in the County Court, to hold the surety for more than the judgment and interest.

ACTION to recover upon an undertaking given on an appeal to this court from a judgment rendered in the Justice's Court.

Richard S. Harvey, for plaintiff.

Wm. Reddy, for defendant.

TOMPKINS, J. This action was brought in the County Court to recover on an undertaking executed by the defendant as surety and given on an appeal to the County Court by one John J. Dempsey from a judgment rendered against him in a Justice's Court in favor of Henry M. Hennion, the plaintiff in that action and the plaintiff in this action.

In the notice of the appeal taken by Dempsey, a demand was made for a new trial in the County Court, and a trial in that court was accordingly had, resulting in judgment in the plaintiff's favor and against Dempsey for $138.57.

Execution was issued thereupon against the defendant and returned unsatisfied; after which this action was brought against the defendant, the surety in said undertaking, to recover the sum of $100, the penal sum mentioned in the undertaking, which reads as follows: "County of Rockland, Justice's Court, Town of

Orangetown, Henry M. Hennion against John J. Dempsey, defendant. Whereas on the 30th day of April, 1896, the above-named plaintiff recovered a judgment in the above-named Court before William W. Whyard, Esq., Justice, for the sum of Twenty-five dollars damages, and Five and seventy-five one-hundredths dollars costs, against the above-named defendant John J. Dempsey, and Whereas, the said John J. Dempsey, defendant, feeling aggrieved thereby intends to appeal therefrom to the County Court of Rockland County. Now therefore, we the said John J. Dempsey and David W. Kipp of the Town of Orangetown, Rockland County, New York, do jointly and severally bind ourselves to Henry M. Hennion, plaintiff above named, in the sum of One Hundred Dollars, that we will pay to the said Henry M. Hennion, the above-named plaintiff, the amount of said judgment for damages with interest from the date thereof, or so much thereof as may remain unsatisfied in case said appeal shall be dismissed, or if judgment shall be rendered against said John J. Dempsey, defendant and appellant in said County Court, and execution issued thereon shall be returned wholly or partly unsatisfied."

The execution was returned wholly unsatisfied.

The defendant's contention is that in and by the undertaking he only obligated himself to pay the sum of $25 damages with interest from the day of the recovery of the judgment in the Justice's Court.

The question to be determined, therefore, is, what is the meaning of the undertaking, and what construction is to be placed upon it? Its language clearly limits the liability of the surety to the payment of the amount of the judgment rendered in the Justice's Court, but the plaintiff contends that the purpose and intent of the undertaking and surety was to secure the payment of the judgment that might be recovered on the trial of the action in the County Court, to the extent of the sum of $100 named in the undertaking.

The plaintiff claims, that inasmuch as the Code of Civil Procedure requires that to perfect an appeal to the County Court, where a new trial is desired, the giving of an undertaking to secure the payment of the judgment that may be rendered in that court is necessary, forces the conclusion that such was the purpose and intention of the parties who executed this undertaking, and that it having accomplished the purpose for which it was intended, and the defendant and appellant having had the benefit of an appeal

and stay of execution, that the defendant is now estopped from denying the valid and binding effect of the undertaking to the extent required by law as a requisite to such an appeal and stay.

I am not convinced that the doctrine of estoppel is applicable to the defendant — he not being a party to the appeal nor benefited to any extent by the giving of the undertaking. Further, it cannot be said that the plaintiff was induced to do any act, or forego any right, by the act of the defendant in signing the undertaking, because if it was not in proper form or sufficient to perfect the appeal and operate as a stay of execution, the plaintiff could have proceeded with his execution and dismissed the appeal or compelled a proper undertaking to be given.

In the case of Goodwin v. Bunzl, 102 N. Y. 224, cited by the counsel for the plaintiff, the appeal was from a judgment in replevin to the General Term, and instead of the undertaking conforming to section 1329 of the Code, which provides that to stay execution "a written undertaking in a sum fixed by the court below, or a judge thereof, to the effect that the appellant will obey the direction of the Appellate Court upon the appeal," must be given, the appellant gave an undertaking under section 1327 of the Code, the condition of which was "that if the judgment or order appealed from, or any part thereof, is affirmed, or the appeal is dismissed, he will pay the sum recovered or directed to be paid by the judgment or order, or the part thereof as to which it is affirmed," and in that case it was sought to enforce the undertaking that was given, and the court properly held that the undertaking was not illegal, and that inasmuch as it had been treated as appropriate and effective for the purpose of a stay, it was founded on a good consideration, and was "*enforcible according to its terms;*" it was not held, however, that it was good for any other purpose, *or could be enforced beyond its express terms.*

In the leading case of Teall v. Van Wyck, 10 Barb. 376, cited and relied upon by counsel for the plaintiff, the bond was given on an appeal from a judgment of a Justice's Court to the County Court of Albany county, and was in the usual form, except that the words "Albany Common Pleas," were inserted in the condition instead of "Albany County Court." In all other respects the bond was complete, and the appeal, in fact, was taken to the Albany County Court, the "Albany Common Pleas" having been abolished. The error was clearly clerical and unimportant, and did not affect the amount or condition of the bond. The court

held, " when the words of a bond are not sufficiently explicit, or if literally construed their meaning would be nonsense, it must be construed with reference to the intention of the parties. In doing this it is allowable to depart from the letter of the condition, to reject insensible words, and to supply obvious omissions."

In the undertaking now under consideration there are no insensible or meaningless words, and inasmuch as the undertaking and the conditions thereof explicitly and unequivocally fixed the liability to the extent of the judgment in the Justice's Court, and in the absence of proof that he intended anything else, I cannot determine that his intention was to do something not mentioned or suggested by any word of the undertaking. While it is true there is no provision in the statute for the giving of such an undertaking, there is nothing to prevent such a one being given, and there is nothing to prevent the plaintiff excepting to its sufficiency, and requiring a new one to be given, or he might have proceeded to enforce the judgment notwithstanding the appeal.

The rule is well established that the liabilities of sureties are restricted to the terms of their contract, and forbids an extension thereof by inference or amplification unless the instrument shows a clear intention on the part of the sureties to accomplish more. Briggs v. Brown, 13 Abb. N. C. 481; McElroy v. Munford, 128 N. Y. 303.

There is nothing in the instrument in question which shows any intention on the part of the defendant to do more than obligate himself to pay the original judgment.

The fact that the respondent treated it as a good and sufficient undertaking and operative as effecting the appeal cannot create any liability on the part of the surety to do any more than his written contract called for. Post v. Doremus, 60 N. Y. 371.

There is no evidence in the case that the defendant knew that the appeal taken by Dempsey was for a new trial in the County Court, or that he knew the purpose for which the undertaking was given.

I am convinced that the defendant is only liable in this action for the sum of $25, the amount of the damages awarded in the Justice's Court, with interest thereon.

It is claimed by the defendant that the plaintiff is not entitled to recover that amount, because defendant made a tender of that amount, which has been refused by the plaintiff.

On the trial, the plaintiff admitted that prior to the commencement of this action the defendant tendered to the plaintiff, or his attorney, the sum of $25 and lawful interest thereon to the date of the tender.

There has been no payment into court of the amount of the tender, either before or since the commencement of the action, nor has there been such a tender as will bar the plaintiff's right to recover in this action.

Judgment for the plaintiff in the sum of $25 and interest thereon from the 30th day of April, 1896.

WILLIAM S. DECAMP, Individually and as Trustee, Plaintiff, *v.* DANIEL A. BULLARD et al., Defendants.

(Supreme Court, Herkimer Special Term, January, 1898.)

Undertaking — Construction — Use of a stream for floating logs.

Where, after an action, brought by the plaintiff to restrain the defendants from floating logs down an alleged private stream in John Brown's tract, Herkimer county, has been decided in his favor and the stream has been declared to be his property, the defendants appeal and are, by the Appellate Division, subsequently allowed, as the only possible means of marketing a quantity of logs on hand, to float them down the stream upon giving to the plaintiff an undertaking securing him against "any and all damage and loss whatsoever," the sureties are liable for the fair value of the use of the stream, and the fact that it was not shown that the logs damaged the banks, or that the plaintiff could have rented the stream to others, is immaterial.

ACTION brought upon an undertaking made and executed by the defendants, for and on behalf of John A. Dix and Edward Thomson, Jr., and conditioned for the payment of any and all damages and loss sustained by the plaintiff on account of the suspension of an injunction, which restrained said Dix and Thomson from floating certain logs upon a stream or river belonging to the plaintiff. This action was tried before the court and a jury, and the jury rendered a verdict for $500 in favor of the

plaintiff, which by agreement of the parties was taken subject to the opinion of the court.

C. L. Adams, for plaintiff.

Charles E. Snyder, for defendants.

McLENNAN, J. The plaintiff, at the times herein mentioned, was the owner of township 7 and the north half of township 1, John Brown's tract, Herkimer county. About the year 1894, John A. Dix and Edward Thomson, Jr., became the owners of the soft-wood timber on township 8 in said tract, which adjoins township 7. The north branch of Moose river flows through a portion of township 8, and entirely through the premises of the plaintiff.

After Dix and Thomson had become the owners of the timber on township 8, they cut a large quantity of it into saw logs, and prepared to float the same down the north branch of Moose river over the premises of the plaintiff, to the mill of Dix and Thomson, some sixteen miles below, claiming the right to do so upon the ground, among others, that the north branch of Moose river was a public highway. Thereupon the plaintiff brought an action in the Supreme Court against said Dix and Thomson, and demanded judgment that they be restrained and perpetually enjoined from floating logs upon or in any manner using that part of the north branch of Moose river which flows through the premises of plaintiff, upon the ground that the same was a private stream or river, and that it was the exclusive property of the plaintiff, and that the defendants in that action had no right, title or interest in or to the same, and had no right to use said river for any purpose whatsoever.

The issues in that action were referred to William G. Tracy, Esq., as sole referee to hear and determine the same. After hearing the proofs and allegations of the respective parties, he made his report in favor of the plaintiff, and on or about the 29th day of June, 1896, judgment was duly entered in favor of the plaintiff and against the defendants, which, among other things, determined that the plaintiff was the owner of Moose river, and was entitled to its use exclusively, and that the plaintiff was entitled to an injunction restraining the defendants in that action and perpetually enjoining them from entering upon or floating any

logs upon said river, or in any manner using the same, as it flows through the premises of the plaintiff, for a distance of sixteen miles from township 8, which judgment was duly entered in the clerk's office of Herkimer county. An appeal was taken from that judgment to the Appellate Division of the Supreme Court, fourth department, and thereafter by decision of said court the said judgment was in all things affirmed, and such judgment of affirmance was duly entered on the 7th day of April, 1897.

Thereafter and on the 9th day of April, 1897, a motion was made by the defendants in that action, Dix and Thomson, before said Appellate Division of the Supreme Court, for an order directing, among other things, that the remittitur of said court be recalled and amended so as to permit the defendants in that action to float out and remove the timber which was cut prior to the filing of the decision of the referee, and by which judgment, so entered, the defendants were enjoined from floating logs down and over said north branch of Moose river and its tributaries. Such motion was made upon affidavits made by and on behalf of said defendants, which stated in substance that an appeal had been taken from the judgment rendered by the Appellate Division to the Court of Appeals; that said Dix and Thomson were the owners of the standing soft-wood timber upon township 8, John Brown's tract, in the counties of Herkimer and Hamilton; that they paid therefor the sum of $6 an acre, and that there were about 24,000 acres; that township 8 is situate on the north branch of Moose river, and that the only way to get the soft-wood timber from township 8 to market is to float the same down said river; that before making the purchase aforesaid the defendants consulted counsel, and were advised that they had the legal right to float logs upon said river and that it was a public highway, and that relying upon such advice of counsel they improved said river at an expense of $40,000, and cut about 11,000,000 feet of timber and prepared to float the same down the north branch of said river, when an injunction was obtained by the plaintiff from the county judge of Oneida county, restraining said action on their part. That thereafter such injunction was dissolved, and thereupon the defendants continued their lumbering operations and succeeded in floating down the river to their mill below all the timber cut by them, except about 2,000,000 feet, which remained, and was at the time of the making of said motion before the Appellate Division of the Supreme Court, cut and was on Big

Safford Lake branch of said river, and stating that the injunction rendered by said referee and affirmed by the Appellate Division as aforesaid, prevented the said defendants from floating said timber upon said river, and that in no other way could it be taken to their mill below, or in any manner utilized.

Upon said application or motion the Appellate Division of the Supreme Court thereafter, and on or about the 9th day of April, 1897 (in which was recited the affidavits above referred to), made an order that said judgment restraining and enjoining the defendants from floating logs as aforesaid, entered upon the remittitur of said court, "be and the same is hereby vacated and set aside, and the remittitur of this court in the above-entitled action, on file in the office of the clerk of Herkimer county, the same having been filed on or about the 7th day of April, 1897, be and the same is hereby recalled, and the decision of this court which was filed March 31, 1897, be and the same is hereby amended so as to provide that judgment thereon, as well as all proceedings upon the judgment appealed from, shall be suspended until and including the 20th day of May, 1897, upon condition that the defendants make, execute and file, within five days from the entry of this order, an undertaking in the sum of $5,000, with two sufficient sureties, conditioned to indemnify the plaintiff against any and all loss or damage whatsoever sustained by the plaintiff from this date to and including the 20th day of May, 1897, by reason of suspending said judgment, such undertaking to be approved of as to sufficiency of sureties by a justice of the Supreme Court."

Thereupon the defendants in this action, for and on behalf of said John A. Dix and Edward Thomson, Jr., made, executed and delivered to the plaintiff the undertaking which is the subject of controversy here. Such undertaking recites all the proceedings relating to the litigation between the plaintiff and said Dix and Thomson, the several orders which were made and above referred to, the application to the Appellate Division of the Supreme Court for the suspension and modification of the judgment which restrained the defendants in that action, and the order of the court made thereon, and then follows this provision: "Now, therefore, we (the defendants in this action) do jointly and severally undertake and agree to and with the plaintiff, said William S. DeCamp, individually and as trustee under the last will and testament of Julia L. DeCamp, deceased, that the defendants,

said John A. Dix and Edward Thomson, Jr., will pay to the plaintiff or to his duly constituted legal representatives, any and all damage and loss whatsoever, not exceeding the sum of five thousand dollars ($5,000) sustained by the plaintiff, from the 9th day of April, 1897, to the 20th day of May, 1897, both inclusive, by reason of suspending said judgment so enjoining and restraining the defendants as aforesaid."

The question presented in this action is what is the meaning of, or what is included in the words "any and all damage and loss whatsoever." The contention of the plaintiff is that those words include the tollage and the fair and reasonable value of the use of said river by the defendants. Counsel for defendants insist that said words in the undertaking must be confined to the damage which was done to the banks of the stream, or to some of the structures upon the stream, or to the premises or property of the plaintiff adjacent thereto, or to such sum as the plaintiff was prevented from obtaining for the use of said stream, because of its use by the defendants at the time it was occupied by them in floating their logs.

Upon the trial of the action plaintiff gave no evidence tending to show that the banks of the stream or the dams or structures thereon, or any property of the plaintiff adjacent thereto, was in any manner damaged or injured by floating the logs in question, and no evidence was given by the plaintiff showing or tending to show that he himself had any use for the stream in question at the time it was being used by Dix and Thomson, or that he could have sold or rented its use to any other person than the defendants, or that there was any other person or corporation who, at the time in question, desired to use or occupy the stream for any purpose whatsoever. Under those circumstances it is urged upon behalf of the defendants that the plaintiff is only entitled to recover nominal damages in this action. The plaintiff insists that the words in the undertaking "any and all damage and loss whatsoever," are broad enough to include and were intended by the defendants to include the fair market value of the tollage or use of the river from floating the logs in question, and that the jury having found that such tollage or use was of the value of $500, he is entitled to enter judgment for that amount.

In floating logs upon the portion of the Moose river owned by plaintiff, Dix and Thomson were trespassers. For the time being they took possession of and occupied the lands of the plain-

tiff against his will and protest. They were permitted to do so by the order made by the Appellate Division of the Supreme Court, which order effectually tied the hands of the plaintiff, and prevented him from resisting the invasion of his property. Such order was made, however, upon condition that in the place of the right to resist the invasion of his property by Dix and Thomson by force, if necessary, he should have their bond conditioned for the payment of all damages and loss which he might sustain on account of the trespass which they, Dix and Thomson, were about to commit and did commit upon his premises. There is no doubt but that in an action brought against Dix and Thomson, the plaintiff would be entitled to recover for the use and occupation of the premises what such use and occupation was reasonably worth.

The correct rule is stated in Sedgwick on Damages, section 185, as follows:

"Where the owner of land is wrongfully prevented from occupying it, the measure of his damages is the value of the use of the land, that is, its rental value. So, where the plaintiff's farming land was wrongfully overflowed by the defendant, the measure of damages is the use of the land."

At section 186 of the same work, it is said:

"Rent is given not as specific damages, but as a fair average measure of compensation for interfering with the owner's use of property, and no inquiry should be permitted as to the likelihood in the particular case of rent having been obtained."

In an action by the plaintiff against Dix and Thomson for taking forcible possession of his river, it would be immaterial whether or not there were other customers for its use. If they had taken plaintiff's horse against his will and used it, they would have been liable not only for any injury done to the horse, but also to the fair value of the use of the horse, and they would not be relieved from paying for such use by showing that if they had not used the horse he would have remained idle, or even by showing that the horse was in better condition for having been used.

So it would have been no defense to an action brought against Dix and Thomson for using plaintiff's river against his will, that if they, Dix and Thomson, had not used it the river would have been unused, and that its use by them did not injure it in the least. Such evidence might be competent as bearing upon the value of the use, but for no other purpose.

But while it is clear that such would be the rule if the plaintiff had brought his action against Dix and Thomson, it is claimed that the defendants have not assumed any such obligation by executing the undertaking in question; that its language must be strictly construed in their favor, and that because the banks of the plaintiff's river were not damaged, no part of the real estate or appurtenances were damaged, and because if the defendants had not used the river no one else would, the plaintiff sustained no damages or loss within the meaning of the words of the undertaking, and, therefore, cannot recover in this action.

It is the rule, as contended by defendants' counsel, that the obligation of a surety must be strictly construed, and cannot be extended to any liability not strictly within the terms of his contract.

In the case of National Banking Association v. Conkling, 90 N. Y. 116, the rule is stated as follows, per Earl, J.:

"A surety is never to be implicated beyond his specific engagement, and his liability is always *strictissimi juris*, and must not be extended by construction. His contract must be construed by the same rules which are used in the construction of other contracts. The extent of his obligation must be determined from the language used, read in the light of the circumstances surrounding the transaction. But when the intention has thus been ascertained, then the courts carefully guard the rights of the surety, and protect him against a liability not strictly within the precise terms of his contract."

Again, it is said in Ward v. Stahl, 81 N. Y. 406, per Miller, J.:

"The liability of a surety is limited to the express terms of the contract, and his obligation should be construed strictly and favorably to the surety, so far as is warranted by the terms employed."

In McCluskey v. Cromwell, 11 N. Y. 593, the court says, per Allen, J.:

"The principle is well settled that a surety is not held beyond the fair scope of his engagement, and that in contracts of suretyship, above all other contracts, the meaning of the words and phrases is not to be extended to the prejudice of the surety, but that words shall be taken to have been used in their ordinary sense. In other words, the liability of sureties is always *strictissimi juris*, and should not be extended by construction."

The rule is equally well settled that in determining the liabilities of sureties, not only should the precise words of the contract

be considered, but also all the circumstances surrounding the transaction, in order to determine the intent of the parties. National Banking Association v. Conkling, *supra.*

The whole scope and purpose of the undertaking may be considered.

In the case of McElroy v. Mumford et al., 128 N. Y. 303, the head-note is as follows:

"The rule which restricts the liability of sureties to the strict terms of their contract, and forbids an extension thereof by inference or implication, does not apply to a case where the instrument shows a clear intention, on the part of the sureties, to come under a more enlarged obligation."

That was an action upon an undertaking given upon an appeal to the Court of Appeals, from a judgment of affirmance of the General Term. The undertaking described the judgment as one recovered by the respondent against the appellant on December 12, 1897, for $123.97, being costs of affirmance, and was to the effect that in case of affirmance the appellant would pay the sum directed to be paid by the judgment appealed from, or the part thereof affirmed. The notice of appeal served with the undertaking described the appeal as from an order affirming a judgment entered June 30, 1897, for $3,659.08, and from a judgment entered December 12, 1897, for $123.97, costs upon said affirmance. The sureties claimed that as the undertaking referred to the judgment at General Term as one for costs alone, it should not be held to cover the original judgment for $3,659.08. Held, untenable. That the evident intent was to appeal from and secure a stay of the entire judgment of the General Term, and this was sufficiently indicated by the language of the undertaking, and the sureties were held liable for the entire amount of the two judgments.

In the case of Goodwin v. Bunzl, 102 N. Y. 224, the defendant had executed an undertaking on an appeal to the General Term from a judgment for the recovery of a chattel. The undertaking actually given was in the form prescribed by the Code to stay execution on money judgment alone. It was held: "In accordance with what was assumed to have been the intention of the parties, that the undertaking was a valid security for a stay of proceedings on the appeal, as otherwise it would have been an idle ceremony to execute it."

In this case the recitals in the undertaking, the orders and proceedings therein referred to, the purpose in procuring the injunction and judgment to be suspended, the real purpose of the undertaking, the situation and character of the property to be affected, and the status of the parties in respect to the property, may all be taken into consideration in determining what the real intent of the defendants was in executing the undertaking in question. They executed such instrument as a condition of obtaining an extraordinary and unusual order from the Appellate Division of the Supreme Court, an order suspending its solemn judgment, and permitting Dix and Thomson to invade and trespass upon the private premises of the plaintiff. An order which enabled them, Dix and Thomson, to use plaintiff's property for their own uses, purposes and advantage. What was the purpose of the defendants in executing such undertaking, and thus securing to Dix and Thomson such valuable rights? Was it that they would pay any damages that might be done to the banks of the river in the wild forest, as it flows for a distance of twenty-five miles through the plaintiff's lands? If so, then the execution of such undertaking was an idle ceremony, because no damage of that character could possibly result. There were no structures upon the river to injure, no improvements to destroy. It was substantially in its natural state, and it was clear that floating logs upon it could work no damage or injury to its physical condition. Was it the intention of the parties in executing the bond in question to pay loss of use only in case the plaintiff or some other person should happen to desire to use the river during the six weeks Dix and Thomson were permitted to use it? If so, then again the giving of the undertaking was an idle ceremony, because it clearly appeared by the proceedings referred to in the undertaking that no one else could use the river, or had use for it. That no customer could have been found who would use the river during the six weeks that Dix and Thomson were permitted to use it by the order of the Appellate Division of the Supreme Court.

If, however, it be assumed that the defendants intended to obligate themselves to pay what the use of such river by the defendants was fairly and reasonably worth, then their action in giving the undertaking means something; becomes intelligible. In that case they obligated themselves. In the other case suggested they incurred no liability, and in case they did not, under the circumstances, obligate or intend to obligate themselves, the giving of

the undertaking was an idle ceremony, and under it by no possibility could they incur liability. The condition imposed by the Appellate Division in such case was a delusion, and if complied with by Dix and Thomson could not in any way result in benefit to the plaintiff.

It is believed that the intention of the Appellate Division in requiring Dix and Thomson, as a condition of compelling the plaintiff to permit them to use and enjoy his property, to execute an undertaking, was to secure to him payment for the fair use of his property, and that it was the intention of the defendants in executing the undertaking in question, to obligate themselves to make such payment.

It is also believed that the plaintiff sustained loss to the amount of the fair value of the use of the stream, within the exact meaning of the words of the undertaking. Dix and Thomson had 2,000,000 feet of timber cut ready to be floated to their mill below, over the river which it had been determined belonged exclusively to the plaintiff, and which flowed through his premises. There was no other way to get such timber to market except to float the same over said river. It also appeared that unless so removed then such timber would be greatly injured, if not totally destroyed.

It seems to me that it is not unreasonable to suppose that under those conditions, if the plaintiff's hands had not been tied by the order of the Appellate Division of the Supreme Court, they would have paid the plaintiff at least the fair value of the use of the river, for the privilege of using the same. The court by its order put it out of the power of the plaintiff to negotiate for the use of his property, and it would seem that the court must have intended that those permitted to use such property by its order, and against the protest of the owner, would at least pay what such use was reasonably worth.

Such I believe was the intention of the parties in executing the undertaking. It follows that the plaintiff should be permitted to enter judgment upon the verdict rendered in this action, to-wit: for the sum of $500, with costs to be taxed. Ordered accordingly.

Ordered accordingly.

ASHTON W. ADAMS et al., Plaintiffs, *v.* JOHN MOORE, Defendant.

(Supreme Court, Jefferson Special Term, January, 1898.)

Receipt — Omission of stenographer's fees — Relief.

Where attorneys stipulate that stenographer's fees shall be a part of the referee's fees and shall be paid by the party taking up the report, a mistake by which the attorney prevailing gave a receipt in full and discontinued the action, without entry of judgment, upon payment of an amount which did not, to the knowledge of the attorney opposed, include the stenographer's fees, may properly be corrected, the receipt and discontinuance be set aside and the parties prevailing be allowed to enter judgment for the stenographer's fees.

MOTION to permit plaintiffs to enter judgment against the defendant for the sum of $138.34, the balance of the taxable costs in the above-entitled action, and to set aside a receipt alleged to have been given by the plaintiffs by mistake, in full of the costs and disbursements in said action.

Elon R. Brown, for motion.

Thomas Hogan, opposed.

MCLENNAN, J. This action was brought to recover for goods sold, rental of certain tools, and for money advanced to the defendant amounting in the aggregate to the sum, as claimed in the complaint, of $1,808.17. The defendant by his answer denied the material allegations of the complaint, and set up a counterclaim of $136 for a breach of contract.

The issues in the action were referred to Charles G. Baldwin, Esq., of Syracuse, N. Y., as sole referee, to hear and determine the same. The case was duly tried before said referee, and thereafter he duly rendered and made his decision, in and by which he found that the plaintiffs were entitled to recover of the defendant the sum of $1,676.35, besides the costs of the action, and judgment was ordered accordingly.

It was stipulated by the respective attorneys before said referee, that the fees of the stenographer should be treated the same as

if part of the referee's fees, and paid by the party taking up the referee's report, to be taxed against and paid by the unsuccessful party. The stenographer's fees amounted to the sum of $138.34, and were paid by the plaintiffs to the referee when the fees of the referee were paid, and when the report was taken up by the plaintiffs.

Upon the making of said report by the referee the attorney for the defendant wrote a letter to the attorney for the plaintiffs, of which the following is a copy, namely:

"SYRACUSE, N. Y., *June* 21, 1895.

"My Dear Elon.— Please send me a statement of your claim, including bill of costs. You might notice the latter for taxation, far enough away to enable me to examine them, and if they are all right to stipulate, so as to save you the necessity of appearing, if I think they are all right. Moore told me that he would give me a check as soon as I had the right amount, and you need not enter any judgment, because we expect to pay right up.

"Very truly yours,

"THOMAS HOGAN.

"Hon. ELON R. BROWN, Watertown, N. Y."

Thereafter the attorney for the plaintiffs verified a bill of costs in said action, which had been prepared by a clerk in his office, in which the fees of the stenographer, to-wit: the sum of $138.34, was omitted by mistake from said bill. Upon the receipt of such bill of costs by the attorney for the defendant, he sent to the attorney for the plaintiffs the check of the defendant, for the amount of damages awarded by the referee and the costs as stated in said bill, but which did not include the stenographer's fees, and plaintiffs' attorney thereupon delivered to the defendant's attorney a receipt in full for the damages, costs and disbursements in said action, and signed a stipulation discontinuing and settling said action.

The payment by the defendant's attorney to plaintiffs' attorney of the amount of damages and costs in said action was made on the 8th day of April, 1895. The attorney for the plaintiffs did not discover that a mistake had been made, and that the stenographer's fees were not included in said sum until the month of April, 1896, when he made the final settlement with his clients in this action. Immediately after learning of said mistake plain-

tiffs' attorney wrote a letter to the attorney for the defendant, calling his attention to the mistake made, and asking him to correct the same by causing the said sum of $138.34 to be paid. The attorney for the defendant declined to cause such payment to be made.

Thereafter and on or about the 9th day of May, 1896, a motion was made at a Special Term held in the courthouse in the city of Watertown, Jefferson county, N. Y., for an order permitting the plaintiffs to enter judgment in this action for the said sum of $138.34, and to set aside the receipt, stipulation and discontinuance theretofore given in the case by the plaintiffs.

Said motion came on to be heard, Elon R. Brown appearing for said motion, and Thomas Hogan, attorney for the defendant, opposed. After hearing the attorneys for the respective parties, the court announced its decision orally, stating in substance that said receipt and discontinuance might be set aside, upon condition that the plaintiffs repay to the defendant the sum received by them from the defendant, and that then the plaintiffs might be permitted to enter judgment for the entire amount of the damages awarded by the referee and the costs and disbursements of said action, including $138.34, the stenographers's fees. Said decision as announced was made upon the ground that it did not appear, and the court could not find, that the defendant or his attorney knew at the time such payment was made by him, that an error or mistake had been committed in the computation of the costs which plaintiffs were entitled to recover.

No order was entered upon that motion, but subsequently and on or about the 6th day of April, 1897, a motion was made to revive the motion made on the 9th day of May, 1896, and asking for an order permitting the plaintiffs to enter judgment in this action for said sum of $138.34, and to set aside the receipt, stipulation and discontinuance above referred to. Upon said second motion it appeared by the affidavit of Elon R. Brown, attorney for the plaintiffs, that after the argument on the motion made on the 9th day of May, 1896, and after such verbal decision was made by the justice holding said term, the attorney for the defendant stated to the attorney for the plaintiffs that at the time the stipulation referred to was made and receipt given, the said defendant's attorney knew that the attorney for the plaintiffs had made a mistake, by leaving out of the bill of costs in this action the $138.34 paid to the stenographer, and that said receipt and

stipulation of discontinuance were given and the money paid by defendant's attorney with the knowledge on the part of defendant's attorney that said mistake had been made.

Upon this motion defendant's attorney concedes that such statement made in the affidavit of the attorney for plaintiffs is true, and that he received the receipt and stipulation of discontinuance knowing that plaintiffs' attorney had made a mistake, and was receiving $138.34 less than plaintiffs were entitled to receive in said action. There is no pretense that plaintiffs were not entitled to receive $138.34, in addition to what they did receive from defendant. There is no suggestion that said sum was not properly taxable as disbursements in said action. No suggestion that the payment by the defendant was made, at the time it was made, by reason of there having been any reduction in the amount which was due from him to plaintiffs, and there is no suggestion that at the time such payment was made by the defendant he did not know, and his attorney did not know, that he was omitting to pay the full sum due and owing to the plaintiffs, by reason of the mistake and error of plaintiffs' attorney.

Under the circumstances we think that plaintiffs should be permitted to enter judgment against the defendant in said action, for said sum of $138.34, and that the receipt and stipulation of discontinuance in said action should be set aside or modified accordingly, but without costs of this motion.

Ordered accordingly.

HIRAM MOUNT, Plaintiff, *v.* ROBERT H. HAMBLEY et al., Defendants.

(Supreme Court, Jefferson Special Term, January, 1898.)

Deed — Exception, accompanied by a reservation of a right of way in favor of the grantors.

A grant by executors, having a power of sale, of certain lands "Saving and excepting therefrom fifteen feet by fifteen feet on the northeasterly corner of said lot, reserved as a way to Reade's (their testator's) cellar," under his store upon the adjoining lot, absolutely excepts from conveyance the plot described and reserves no easements over it in favor of the grantee; and where it further appears that a subse-

quent mesne grantee, under the executors, of the store and plot, has, under a claim of right, by himself and by his grantors, long used the plot as a way to the cellar and has also built a shed upon it, he cannot be restrained by the owner of the lot first granted from building more substantially upon it, as the latter owner has no easements of light, air, or of any nature in regard to it.

ACTION in equity brought to determine the rights of the parties to this action, to a certain piece of land fifteen feet square, situate in the village of Clayton, Jefferson county, New York.

Wayland F. Ford, for plaintiff.

Elon R. Brown, for defendants.

MCLENNAN, J. One Thomas M. Reade was, at the time of his death, the owner and in possession of a certain tract of land situate in the village of Clayton, Jefferson county, N. Y. Prior to November 2, 1865, said Reade died, leaving a last will and testament, by which, among other things, he appointed Rachel Reade and Joseph W. Reade his executors, and gave them full power and authority to sell and convey the premises now owned by plaintiff and defendants. A portion of such premises was occupied by a brick store known as Reade's store.

By deed dated November 2, 1865, said executors conveyed a portion of said premises to one John M. Cline, which is the conveyance under which the plaintiff acquired all the right, title and interest which he has in and to the premises in question. The premises conveyed to said John M. Cline were described as follows, viz.: "All that tract or parcel of land lying and being on James street in the village of Clayton, Jefferson county, N. Y., and being parts of village lots numbers 17 and 18, as surveyed by Clark W. Candee, and lying alongside and adjoining land contracted to Edward Ryan, being thirty feet on James street, and extending back the same width sixty feet, the lot being thirty by sixty feet, and being all the lands lying between the said Ryan lot and said Reade's brick store. Saving and excepting therefrom fifteen feet by fifteen feet on the northeasterly corner of said lot, reserved as a way to Reade's cellar."

Thereafter and on the 17th day of February, 1869, by a good and sufficient deed, the said executors conveyed to one Alonzo

Kring the other portion of the premises, and under that conveyance the defendant acquired all the right, title and interest which he has in the premises in question. The description in the deed to Kring was as follows:

"All that piece or parcel of land situate in the village of Clayton, county of Jefferson, state of New York, bounded as follows: On the southwest by James street; on the northwest by Water street; on the northeast by a way twelve feet wide reserved for that purpose, and on the southeast by premises contracted to James W. and Samuel R. Thomson by Thomas M. Reade, March 23, 1869. Together with a plot of ground fifteen feet by fifteen feet adjoining the northeast corner of these premises, and reserved from the northerly corner of the lot contracted to said Thomson for a cellarway for the store on the premises hereby conveyed. Together with a right of way," etc.

The fifteen feet square last mentioned, it is conceded, is the same fifteen feet square mentioned in the deed under which plaintiff claims.

At the time the two deeds in question were made by the executors of Thomas M. Reade as aforesaid, the plot of ground fifteen feet square referred to in each deed, was used for a cellarway leading to Reade's store, and continued to be so used, to some extent at least, down to the time of the trial. The premises were covered by a shed or low building, and were also used by defendant and his grantors for a storage-room, coalroom and closet, and were not used for any purpose by the plaintiff or his grantors under claim of title. Before the commencement of this action the defendant claimed the exclusive right of possession of said plot of ground, and declared his intention of erecting thereon a substantial two-story building, to be used for any purpose which he might choose.

The plaintiff contends that the defendant has no right to use or occupy the plot of land in question, for any other purpose than as a cellarway to his store (formerly Reade's store), and that he has no right to erect any building or structure thereon which will interfere with plaintiff's light or air, and he seeks an injunction so restricting the defendant in the use of said premises. Whether or not the plaintiff is entitled to the relief demanded, depends upon whether the words of limitation contained in his deed, viz.: "Saving and excepting therefrom fifteen feet by fifteen feet from the northeast corner of said lot, reserved as a way to

Reade's cellar," constitute an exception or a reservation. If an "exception," then the plaintiff took no title to the plot of ground in question, and acquired no right or interest therein. If a "reservation," the plaintiff, by the grant in question, acquired the fee to the land, and all the right and interest of the grantor in and to the same, subject only to "a way to Reade's cellar." The fact that one or the other of the words "exception" or "reservation" may have been used in the conveyance is not conclusive, but all the words of the grant must be considered, and if their meaning is uncertain or ambiguous, then all the circumstances surrounding the transaction, in order that it may be ascertained whether the grantor parted with the title, but retained to himself some right or interest in the thing granted, in which case there would be a "reservation," or whether the grantor retained to himself a part of the premises described as granted, which would constitute an "exception." "Reservation" and "exception," as applied to grants of land, were clearly defined in the case of Craig v. Wells, 11 N. Y. 315, per Selden, J.:

"Reservation is always of something taken back out of that which is already granted, while an exception is of some part of the estate not granted at all. * * * A reservation is never of any part of the estate itself, but of something issuing out of it, as for instance, rent, or some right to be exercised in relation to the estate, as to cut timber upon it. An exception, on the other hand, must be a part of the thing granted or described as granted, and can be of nothing else."

This definition was approved in the case of Blackman v. Striker, 142 N. Y. 555.

The case of Craig v. Wells, *supra*, cites with approval the following definition by Shepard: "A reservation is a clause in a deed, whereby the grantor doth reserve some new thing to himself out of that which he granted before. This doth differ from an exception, which is ever part of the thing granted, and of a thing *in esse* at the time; but this is of a thing newly created, or reserved out of a thing demised, that was not *in esse* before." Shepard's Touchstone, 80.

The test is whether or not the thing was granted or conveyed at all, although embraced in the general description. If not then clearly it is an exception; but if the thing be granted, and some right or interest therein is reserved, then it is a reservation. The words in plaintiff's grant are, "Save and excepting therefrom a

piece of land fifteen feet square;" if there was nothing more, it would concededly have been an exception, and no title to or interest in that plot of ground would have passed, but there follows these words: "Reserved as a way to Reade's cellar," and as before said, it is claimed that those words, taken in connection with the exception, constitute a reservation, and that the grantor acquired the fee to the plot of ground, subject only to an easement of a way to Reade's cellar. It will be remembered that the grantors were the owners of Reade's store at the time plaintiff's original deed was made, and that the words of limitation in the deed were for their benefit, and it appears that they afterwards conveyed the premises known as Reade's store, and the plot of ground in question, to the defendant's grantor.

In the case of Bridger v. Pierson, 45 N. Y. 601, it appeared that the defendant conveyed to the plaintiff by deed fifty-four acres of land, which land was described by metes and bounds, and then followed the words: "Reserving also a right of way as now used on the west side of the above-described premises, for cattle and carriages, from the public highway to the piece of land now owned by Samuel B. Reeves, lying north of and adjoining the piece of land here conveyed."

It was held, per Grover, J., that this was an exception from the grant of the right of way used, and that the grantee in that deed acquired no right, title, interest or easement in or to the lands included in or covered by such way.

In the case of Mayor v. New York Central & Hudson River R. R. Co., 69 Hun, 325, the head-note is as follows:

"A grantor, who states in his deed that he excepts therefrom a certain portion of the land for a certain purpose, cannot be held to have conveyed that which he expressly excluded by the deed, because he afterwards devotes it to a different purpose."

In that case the grant was of certain premises described by metes and bounds, and from the grant was excepted "so much of the land embraced within the foregoing description as formed parts or portions of Thirty-ninth street and Twelfth and Thirteenth avenues, for the uses and purposes of public streets, avenues and highways."

At page 326 the court said, per Van Brunt, J.:

"But by this grant there was expressly excepted the soil embraced within the limits of the streets shown upon the map annexed to the conveyance.

"It is true that in the conveyance it was stated that such exception was made for the uses and purposes of public streets, avenues and highways. But it is entirely immaterial for what purpose the exception was made, if the land in question was not included in the grant, as clearly it was not. A grantor who states in his deed that he excepts a certain portion of the land because he wants it for a certain purpose, cannot be held to have conveyed that which he has expressly excluded, because he afterwards devotes it to a different purpose. The land in question was not included in the grant, and, therefore, no title passed."

In Munn v. Worrall, 53 N. Y. 44, it appeared that the original grantor, Francis R. Tillou, conveyed certain lands described by metes and bounds, "but saving and excepting from the premises hereby conveyed, all and so much and such part and parts thereof as has or have been lawfully taken for a public road or roads."

The court said, per Rapallo, J.:

"After a careful consideration of the language of the exception, and of the authorities cited by the learned counsel for the respondent, in support of his interpretation of it, we are of opinion that the exception was of the land, and that it cannot be confined to the easement without doing violence to the language used. The exception does not purport to be of any particular estate or interest in the land, but is in terms of a certain part and parcel of the premises embraced within the boundaries set forth in the deed. It is not an exception from the estate of the grantor, but from the premises, and specifies the portion excepted. For the purpose of identifying the excepted parcel, it is described as that part of the premises which has been lawfully taken for a public road."

Continuing, the court said: "None of the cases cited present the feature which exists in the present case, of an exception from the premises described, of a specific portion of such premises. * * * the word "premises," we think, clearly means, in the connection in which it is used, the tract of land described in the deed, and not the estate or interest of the grantor, and the exception was of a portion of such premises, and not of an interest therein. By describing the excepted part as that portion which has been lawfully taken for a public road or roads, lands used as private roads, or roads not lawfully established, were excluded from the exception. The purpose of the expression was manifestly to designate with accuracy what portion of the prem-

ises was intended to be excepted. * * * We think that the fee therein was excepted from the conveyance, and remained in Tillou, and passed by his subsequent conveyance to the plaintiff."

It was held in French v. Carhart, 1 N. Y. 96, that "whenever the language used is susceptible of more than one interpretation, the courts will look at the surrounding circumstances existing when the contract was entered into. * * * When the words of a contract are ambiguous the courts will call in aid the acts done under it, as a clue to the intention of the parties."

That rule has been repeatedly affirmed, and, as claimed by plaintiff's counsel, is applicable to the case at bar.

The case of Blackman v. Striker, 142 N. Y. 555, was an action which involved the construction of a deed which, after describing the premises conveyed, by metes and bounds, contains the following clause: "Saving, excepting and reserving unto the heirs of said John Hopper of the Out Ward, deceased, and to their and each of their heirs, out of this present demise, all that certain burying ground now in fence, consisting of forty-eight feet square parcel of said lot of ground, and commonly called the family burying-ground, with free ingress, egress and regress into, out of and from the same, to bury the dead, etc., forever."

In that case it was held that the title to the burying lot passed to the grantee, and that under the circumstances of that case, the grantor only reserved an easement in and to the same, but such conclusion was not based upon the words of the deed, but upon all the facts and circumstances surrounding that transaction, the character of the title which the grantor had, the subsequent acts of the parties as indicating their intention or understanding as to their respective rights, the character of the premises, etc., and the court said, per O'Brien, J., at page 563:

"There is no reason to believe that the parties to the deed intended that the grantor should retain any beneficial interest in the soil of the burying-ground plot. Matthew (the grantor) was bound to reserve the right of burial for the heirs when he sold the parcel. He was not bound to retain anything more, and the reasonable construction to be placed upon the words of the grant is that they were employed to limit the estate, in the same way as it was held by the grantor.

"He intended to convey all he had, and the grantee intended to acquire no less. This intention was not expressed in clear or accurate language, but, as it is apparent from the nature of the

transaction and from the circumstances, words and phrases used without a clear perception of their true meaning, must yield to what appears to be the intention. If we look at the conduct of the parties after the execution of the deed this view is confirmed. More than a century has passed since the conveyance and it does not appear that Matthew or any of his descendants made claim to any beneficial interest in the property, while John Hopper, the grantee, and his descendants evidently supposed that they owned the fee, subject only to an easement for the burial of the dead. In a case like this, where the defendant in possession has made valuable and expensive improvements upon the property on the faith of a title more than a hundred years old, the plaintiff is bound to make out a clear case. He cannot rest upon the words of the deed alone. A court must be fairly convinced from the language, read in the light of all the surrounding circumstances, that Matthew Hopper intended to retain in himself the fee of the burying-ground, and that the beneficial interest so retained has vested in the plaintiff. A careful consideration of the whole case has not enabled us to reach that conclusion, but, on the contrary, * * * we think he has failed to show any legal title to the property."

It is apparent that the learned court would have held in that case, if only the language of the deed had been considered, that the title to the burying lot did not pass to the grantee of Matthew Hopper, but it was held that all the circumstances clearly indicated that it was the intention of the parties that the title should pass to the grantee, and that only the right of burial in the plot of ground should be retained by the grantor.

In the case at bar there are no circumstances to indicate such intention. On the contrary, it appears that within three years after the grant under which plaintiff claims was made, the grantors conveyed this plot of ground fifteen feet square and the brick store, for a good and valuable consideration, to the defendant's grantor; that under that grant such grantor immediately went into possession of the premises, and that he and his grantees used the same not only as a way to the store cellar, but has covered it with a shed which at first was used for storage purposes, and later erected a two-story structure upon it, which was used for water-closets for the first and second floors, and, so far as appears, used it precisely as if they owned it and had the fee to the same. The plaintiff or his grantees, upon the other hand, have not used

or attempted to use the premises in question, or at least in such a way as to in any manner interfere with its use by the defendant or his grantees.

I have carefully examined the numerous authorities cited by plaintiff's counsel, but have been unable to discover any case in which it has been held that words similar to those used in the deed in question, were sufficient to create a reservation of an easement, unless the acts of the parties or the surrounding circumstances were such as to clearly indicate that such was the intention of the parties. No such intention is indicated by the evidence in the case.

It follows that the plaintiff's complaint should be dismissed, with costs. Judgment is ordered accordingly.

Judgment accordingly.

JOHN LAMBERT, Plaintiff, *v.* GEORGE HUBER, Defendant.

(Supreme Court, Niagara Special Term, January, 1898.)

1. **Action to restrain the obstruction of an alley — Legal title.**

An action may be maintained to enjoin the defendant from obstructing an alley and to compel him to remove existing obstructions, although the plaintiff has not first established his title at law, and particularly in a case where the objection has not been raised by answer.

2. **Same — Adverse possession.**

Adverse possession of parts of an alley is established by the maintenance by an abutting owner and her grantees, during a period of thirty years, of buildings encroaching upon the alley.

3. **Same — Replotting — Easements on a new alley shown.**

Where lands, facing on an alley running east and west, are subsequently and, about 1836, replotted by their owners so that instead of running north and south they run east and west, face on a street and have an alley in their rear and are thus shown on an official city map of 1845, and upon subsequent maps, the latter alley must be deemed to have been laid out for the use of the lots as replotted and a deed of the lots, having reference to the plan by which they were replotted, conveys an easement in the alley.

4. Same — Conveyances of land adversely possessed — Grants to holder of the legal title.

The statute (1 R. S. m. p. 739, § 147), forbidding conveyances of land adversely possessed does not prevent the holder of the legal title, although not a perfect one, from procuring further conveyances in support of his existing title.

5. Same — Void conveyances to a tenant.

Where a tenant takes, from strangers to the title and whom he knew to be out of possession, deeds of a part of an alley used by his landlord to gain access to his premises and also of a small part of the landlord's lot, abutting on the alley, the tenant intending to construct a building thereon and thereby block up the alley, his acts are in bad faith, he, as tenant, is estopped from questioning his landlord's title, he becomes a trespasser and the deeds to him are void under the above statute, forbidding conveyances of lands adversely possessed.

ACTION for an injunction.

Edward C. Hart, for plaintiff.

A. R. Potter, for defendant.

LAUGHLIN, J. This action is brought to enjoin the defendant from permanently obstructing lands which plaintiff claims to own or to have an easement in as an alley to be used in connection with his abutting premises, and also to compel the removal of obstructions heretofore placed thereon.

I think it a proper subject for the jurisdiction of a court of equity, and the objection that plaintiff should first establish his title in a court of law is not fatal, especially since such objection is not raised by the answer. Baron v. Korn, 127 N. Y. 224; Ranscht v. Wright, 9 App. Div. 108.

Locust street, in the city of Lockport, runs north and south, and Walnut street intersects it at right angles. In 1822 an alley, sixteen feet and six inches in width, ran east from Locust street parallel with and 156½ feet north of Walnut street. During the year last named, Jesse P. Haines, a surveyor, in behalf of the proprietors, plotted the block of land lying between this alley and Walnut street and abutting Locust street on the east, by dividing the same into lots running north and south and sixty-six feet in width and extending from Walnut street to the alley, and the subdivision map was filed in Niagara county clerk's office. This

map designated the lot bounding on Locust street as No. 41 and that next east as No. 43.

On March 21, 1836, Lyman A. Spalding and Michael McDonald conveyed Lot 43 to Mary C. Hathaway. The record title to the southerly eighty-two and one-half feet of this lot was then in McDonald's wife and the record title of the northerly part of Lot 43, so far as the abstract introduced in evidence shows it, was in Jared Comstock; but, since he never thereafter conveyed the same or made any claim thereto, it is probable that he had conveyed it to Spalding, as otherwise the latter had no interest and it would have been unnecessary for him to have joined in the conveyance; that, however, is not very material in this case. Spalding then owned said Lot 41. It is evident that by some arrangement between the owners, and perhaps by an exchange of deeds which have been lost, these lands were replotted about this time, for on December 1, 1836, Mary C. Hathaway executed to Lyman A. Spalding a purchase-money mortgage and the description and a diagram annexed, showed that this alley had been widened to fifty-three feet, leaving only 120 feet of land between it and Walnut street, and named Pearl street, and that no Lot 41 was shown, but the lands abutting on Locust street had been subdivided into six lots, each twenty feet in width, fronting on Locust street, and extending back seventy feet and six inches in depth, and abutting in the rear on an alley twelve feet wide, running through from Walnut street to Pearl street. These lots were numbered from Pearl street 1, 3, 5, 7, 9 and 11. In the meantime, Locust street had been widened, taking off three feet three inches of land on the east, thus leaving only sixty-two feet nine inches of the land originally included in Lot 41.

It will thus be seen that these new lots which were laid out after the street had been so widened, extended into what was formerly Lot 43 seven feet and nine inches. This new plotting of the land did show a Lot 43, but it was bounded on the west by the alley and its width was 145 feet running from Walnut to Pearl street.

This mortgage expressly bounds the premises therein described, on the west by this alley and refers to the diagram showing it as herein described. Haines' official maps of the city, made in 1845 and 1866, show the alley the same as it is shown on this diagram, as do also the survey and the other maps introduced in evidence.

From that time on the premises east of the alley thus designated were conveyed by the same description as that contained in

the mortgage last referred to, and by a deed, with such transcription, the title was transferred to Martha Ashford on September 30, 1864. In 1853 Lyman A. Spalding, the owner, conveyed said Lots 7, 9 and 11, as aforesaid plotted, and the descriptions refer to Haines' map, which shows them running back to the alley; and in 1866 the plaintiff obtained title to these lots by the same descriptions.

On December 1, 1874, said Spalding's executrix conveyed the remaining lots fronting on Locust street — 1, 3 and 5 — by similar descriptions, and on December 8, 1874, plaintiff obtained from such grantee a conveyance of said Lot 5 by similar description.

The *locus in quo* is that part of the alley immediately in the rear, or east, of said Lot 5.

The plaintiff, upon obtaining title, took possession of all these lots up to the westerly line of the alley, and more than twenty years before the commencement of this action he caused to be erected thereon a block of brick stores, three stories in height, extending from the Locust street line to within ten feet four inches of the alley, and about the same time placed or erected smaller buildings on most of the space in the rear extending to the line of the alley.

For upwards of thirty years an old building on the Ashford lands, on the east, has encroached upon and occupied seven feet and five inches of the easterly side of the alley from Walnut street northerly along the alley thirty-nine feet, forming a permanent obstruction, and during the same period of time an old building and shed have occupied and permanently obstructed the easterly ten feet and four inches of the alley extending from Pearl street along the alley southerly forty-two and one-half feet, also forming a permanent obstruction to that part of the alley thus occupied. This old building and shed have at all times been used and enjoyed with the Ashford lands on the east.

I have no doubt that Martha Ashford and her grantees have acquired title, by adverse possession, to all that part of the alley thus permanently occupied by them, and plaintiff has no easement therein. Woodruff v. Paddock, 130 N. Y. 618.

There have from time to time been other small, temporary structures, such as hencoops, pigpens, coal and icesheds, erected on other portions of the alley by the plaintiff's grantors or their or his tenants, and used and enjoyed with their or his lands on the west; but there has always been an open passage-way along

this alley from Pearl street to Walnut street, excepting that during the last sixteen years a fence has been erected along the southerly line of Pearl street, cutting off communication between the alley and Pearl street.

I am of the opinion that the alley was originally laid out for the use of the Locust street lots, and that by the deed of the lots with reference to the plan the plaintiff would have acquired a legal easement if his grantor had title. Ranscht v. Wright, 9 App. Div. 108.

For upwards of twenty years the plaintiff and his tenants have used that part of the alley not occupied by the buildings hereinbefore described as permanent obstructions, for the ordinary uses and purposes of an alley, and he has constructed and maintained thereon during all that time a plank walk leading in from Walnut street through the alley to the rear of his stores, and he and his tenants have claimed, as a matter of right, and enjoyed, an easement therein for ingress and egress and for the temporary storing of goods, wares, merchandise and other property, as occasion required. He has constructed and maintained therein a sewer for the draining of all of his said buildings, and has also constructed and maintained the sidewalk and pavement on Walnut street in front of that part of the alley, which was open. The plaintiff has at all times until about the autumn of 1896, admitted and claimed the existence of this alley, and has not denied that the owners of the lands on the east also had an easement therein, and, although there has been no satisfactory, reliable evidence that such owners have used the alley or had any use for it, yet the plaintiff has repeatedly admitted this easement and cannot now be heard to deny their rights and such rights are not lost by mere nonuser. Welsh v. Taylor, 134 N. Y. 450.

Neither Martha Ashford nor any of her successors in title ever denied the existence of the alley or the right of the plaintiff and his grantors to an easement in that part thereof not permanently obstructed, or attempted to prevent the free use or enjoyment of such easement by the plaintiff and his grantors, excepting that on November 17, 1874, she obtained and on December 28, 1879, placed on record, a quitclaim deed from said Lyman Spalding and wife to herself of the lands east of the alley to which she then had title and possession, and it is claimed by the defendant that this deed embraced the alley also, and since it furnishes the only record title to the *locus in quo* claimed by the defendant, it becomes necessary to carefully consider it.

The description in the Spalding quitclaim deed of 1874 is as follows: "Beginning at the point of intersection of the northerly line of Walnut street with the westerly line of Lot No. 43 120 feet to Pearl street; thence westerly along the southerly bounds of Pearl street 145 feet to the easterly line of Lot No. 41; thence southerly along the easterly line of said lot 120 feet to Walnut street; thence easterly along the northerly line of Walnut street 145 feet to the place of beginning."

This description cannot be given effect if we hold that it had reference to the first plotting of the lands in 1822, which is the only plotting that contained both Lots 41 and 43. In the first place, the westerly line of Lot 43, where the description commences, and the easterly line of Lot 41, the return boundary, were identical and no land would be conveyed. Again, the width of the lands conveyed is given as 145 feet, which is the exact width of the new Lot 43, and Pearl street is also referred to and it did not exist when old Lots 41 and 43 existed. The reasonable construction of this deed is, therefore, that the point of commencement was intended to be in the easterly line of Lot 43, and since the width of that lot is exactly 145 feet, being the figures given in the deed and being the definite, unqualified length of the southerly line, we should not assume that it was intended to run westerly nineteen feet and nine inches farther to the old line of Lot 41, which was not then shown on the map to which reference was evidently made. Such a construction would include the rear seven and three-quarters feet of plaintiff's lots, of which he had warranty title through the same Spalding. If, however, this deed should be construed as including the alley and the seven feet and nine inches of plaintiff's lands westerly thereof, it would not avail the defendant.

As has been seen, Spalding had conveyed to Mary C. Hathaway all his right, title and interest in and to the alley and the lands abutting thereon in 1836, and the record does not show that he ever thereafter acquired any interest therein, nor was he ever thereafter in possession thereof. It necessarily follows that Martha Ashford obtained no additional title by this deed. She remained the owner of the said lands easterly of the alley, which bounded on the alley, until her death, which occurred before February 14, 1895, when her will was admitted to probate. Her executors, by deed dated October 18, 1894, but not acknowledged until February 16, 1895, attempted to convey the alley and four

and one-half feet off the easterly ends of the plaintiff s lots abutting on the alley and also some of the lands easterly of the alley, to her daughter, Martha Ashford Thompson, and the latter executed a deed dated July 30, 1896, purporting to convey to the defendant sixty feet of the Pearl street or northerly end of the alley and about twenty-six feet on Pearl street easterly of and extending along the alley sixty feet. The title thus acquired is the only title defendant has. Thereupon the defendant proceeded to excavate on the premises thus conveyed for the foundation of and to erect a brick building twenty feet square in the rear of plaintiff's Lot 5, and covering the entire width of the alley. The defendant then was, still is and since the year 1890 has been the plaintiff's tenant, occupying the store on said Lot 5 as a meat market. In the spring of 1891 the defendant asked leave of the plaintiff to erect a cheap, temporary shed on the alley in the rear of Lot 5, in which to keep his lard kettle and machinery. The defendant was informed that it was an alley and that this could not be done without the consent of the owner of the lands abutting on the east, but that plaintiff had no objection if such consent were obtained. About the time the defendant obtained the deed as hereinbefore recited, he informed plaintiff that he was purchasing some lands of the Ashford estate to the east, upon which he intended to build, and asked and obtained leave of the plaintiff to sewer the same through Lot 5 into Locust street, such license to terminate with his lease of Lot 5; but he did not inform the plaintiff that he was about to purchase or erect a building upon the alley. As soon as the plaintiff learned of the defendant's plan and purpose he procured from the heirs of said Mary C. Hathaway a quitclaim deed of that part of the original Lot 43, which was conveyed to said Hathaway in 1836, and not thereafter transferred by her, so far as the records show, namely, the fee to the alley and the record title to seven feet nine inches of land abutting it on the west. The plaintiff then notified the defendant that he claimed title to the alley and forbid the erection of the building. The defendant did not heed the notice and the plaintiff commenced this action and obtained an injunction *pendente lite.*

The defendant assails the plaintiff's deed from the Hathaway heirs as void, under section 147 of title II of chapter 1 of part II of the Revised Statutes (p. 1813, 9th ed.), which provides that "Every grant of lands shall be absolutely void, if at the time

of the delivery thereof, such lands shall be in the actual possession of a person claiming under a title adverse to that of the grantor." The plaintiff, as has been shown, had not a complete record title to the rear seven feet and nine inches of his lots, which are within the original Lot 43. The plaintiff derives his title through Spalding, and while the latter's deed purports to convey to the alley, Spalding had no record title to any part of Lot 43, and if he had title not of record, or through lost conveyances, he had previously transferred the same to Mary Hathaway by joining in the conveyance to her in 1836. The plaintiff had the right to perfect his record title and was not bound to rest on his title by adverse possession. The plaintiff also had the right to acquire the fee in that part of the alley not claimed by the defendant and not permanently obstructed. To this extent the deed from the heirs of Hathaway was certainly valid.

It has been long since decided that, under the statute hereinbefore quoted, to render a subsequent deed void it is not essential that the person in possession, claiming under an adverse title, should have a good title. That is not the test. But I cannot concede the proposition contended for by the learned counsel for the defendant that a person may in bad faith obtain from a stranger to the title a quitclaim deed and take possession of land knowing that he has no title and thereby render absolutely void every deed the real owner may thereafter obtain to perfect or complete his title. That is this case. When Martha Ashford, in 1874 obtained the quitclaim deed of Spalding, he was a perfect stranger to this title and she must have known it, and when her executors conveyed to her daughter in 1895, the daughter must have known it, and so did the defendant when he took the conveyance. He understood that the *locus in quo* was an alley and realized that he was buying a lawsuit and acted in bad faith in obtaining and asserting this title as to the *locus in quo*. The defendant knew that his grantors had no title and were not in possession, and in taking possession he was a mere trespasser. Jackson v. Andrews, 7 Wend. 152; Livingston v. Peru I. Co., 9 id. 512, 516-24; Humbert v. Trinity Church, 24 id. 610, 611, 635-6.

Under the same statute the deed to him of the rear ends of plaintiff's lots was void and he had and obtained no title to the *locus in quo*. The object of the statute was to prevent the transfer of disputed titles and to compel the settlement of questions as to title between the original parties, but it does not preclude the

holder of the principal title who is in possession from taking conveyances to correct errors or to perfect his title. Crary v. Goodman, 22 N. Y. 176; Fish v. Fish, 39 Barb. 515; Jackson v. Given, 8 Johns. 105; Higginbotham v. Stoddard, 9 Hun, 1; S. C., 72 N. Y. 94; Crossman v. Bradley, 53 Barb. 247-9.

The defendant knew that the plaintiff and no one else was in possession of and using the *locus in quo*, claiming an interest and easement therein for alley purposes, and he was in possession thereof as plaintiff's tenant, and is estopped from claiming any adverse interest, at least until his tenancy terminates. Code Civ. Proc., § 373; Matter of Department of Parks, 73 N. Y. 560-7; Whiting v. Edmunds, 94 id. 309; Church v. Schoonmaker, 115 id. 570.

The plaintiff having the legal title is presumed to have been in possession, and the burden was upon the defendant of showing an adverse possession for twenty years. Code Civ. Proc., § 368; Stevens v. Hauser, 39 N. Y. 302.

In order that either party may have this case fully reviewed by the Appellate Division and the proper judgment entered by that court, without a new trial, if any of my conclusions should not be sustained, I will make no formal findings of fact and conclusions of law, but judgment may be entered on this memorandum opinion, which sufficiently states my views of the facts and law.

Let judgment be accordingly entered adjudging and determining that prior to September 10, 1896, plaintiff and his grantors had for more than twenty years enjoyed an easement in all that part of the *locus in quo*, excepting the northeasterly part, hereinbefore described as having been permanently obstructed by a building or shed, and that on said last-mentioned day he obtained from the owner of the fee a conveyance thereof, and perpetually enjoining the defendant from building thereon or in any manner obstructing the plaintiff's free use and enjoyment thereof in common with the defendant as an open alley, and requiring and commanding the defendant to remove all obstruction heretofore placed therein by him and to restore the premises to their condition at the time he first entered thereon, within thirty days after notice of entry of judgment herein, and for costs of the action, to be taxed by the clerk.

Ordered accordingly.

HARRY SIMON, Plaintiff, v. THE LONG ISLAND MUTUAL FIRE INSURANCE CO., Defendant.

(Supreme Court, Oneida Special Term, January, 1898.)

Insurance — New trial for newly-discovered evidence — Requisites.

Where the defense, to an action upon a policy of fire insurance, is that the pretended loss was the result of a conspiracy to defraud and that the damage was slight, and the proofs of loss served show that the plaintiff's vendor, as to a part of the property destroyed, was his brother and it appears that he, although present in and a resident of the city where the action was tried, was not called as a witness, and then by the plaintiff, until the day before the close of a trial lasting five days, a new trial will not be granted in order to permit the defendant to confute, by alleged newly-discovered evidence, the testimony of the brother, elicited upon cross-examination, that he paid his vendor living in a neighboring city, a price much larger than that which he in fact paid him, as it does not sufficiently appear that the defendant could not, by reasonable diligence, have obtained the proposed new evidence before the trial, nor is it apparent that it, if given, would have been likely to change the result.

MOTION for a new trial upon the ground of newly-discovered evidence.

A. H. Sawyer, for motion.

G. W. Rayhill, opposed.

MCLENNAN, J. This action was brought to recover upon a policy of insurance for $2,000, issued by the defendant upon the 11th day of May, 1895, upon a quantity of tobacco owned by the plaintiff. The policy was one of a series of policies issued by various insurance companies, and amounting in the aggregate to something like $26,000. On the 18th day of August, 1895, the tobacco so insured was destroyed by fire, and the plaintiff claimed that its value was at least the entire amount of insurance. An action was brought upon each of the policies, against the respective insurance companies.

This action came on to be tried before the court and a jury on the 12th day of May, 1897. By the pleadings and at the very outset of the trial it appeared that the defense was, in substance, that the

fire was of incendiary origin; that the plaintiff and his two brothers, Philip and Jacob Simon, had entered into a conspiracy to cheat and defraud the defendant and the other insurance companies; that the loss of the plaintiff on account of the fire was comparatively slight; that the tobacco, if any, which was destroyed, was of little value, and that very much less of the tobacco was burned than was claimed, and that much of the tobacco which had been stored in the building was removed previous to the time of the fire. This line of defense was clearly indicated at the very outset of the trial.

It appeared that soon after the fire the plaintiff prepared proofs of loss which were served upon the defendant, and that they were rejected by it as not being in compliance with the terms of the policy. In such proofs of loss it was stated from whom the plaintiff claimed to have purchased all the tobacco which he claimed was destroyed by fire, and which was covered by the several policies of insurance, and it was stated that fifty-three cases of the tobacco destroyed were purchased by the plaintiff from his brother Jacob Simon. Such proofs of loss purported to give the number of each case of tobacco destroyed, the weight, tare, etc. The plaintiff and his brothers Philip and Jacob resided at the city of Utica at the time of the trial, and for many years prior thereto. The plaintiff was sworn as a witness in his own behalf. His brother Philip was also sworn, and other witnesses gave evidence tending to establish the plaintiff's cause of action. The plaintiff and his brother were cross-examined at great length. They were asked where their brother Jacob was, and they answered that he was in the city of Utica. Such cross-examination clearly indicated that the theory of the defendant was that the purchase by the plaintiff from Jacob was simply a blind, and that the plaintiff was the real purchaser of the fifty-three cases of tobacco.

After the plaintiff rested the defendant submitted proof tending to establish its cause of action, and rested. The plaintiff then upon rebuttal and to explain away any suspicions that might have arisen by not putting Jacob upon the stand, called him as a witness. Upon his cross-examination he (Jacob) was asked from whom he purchased the tobacco in question. This was upon Monday, the 17th day of May, 1897. Jacob answered that he purchased the same from Julius Marqusee, who resided at Syracuse, N. Y., and he then said that he did not remember or know how much he paid for the tobacco, but finally said that he paid forty or fifty cents a pound. The evidence was closed on the said 17th day of May,

1897, and on the following morning the case was summed up by the respective counsel, and submitted to the jury. The jury rendered a verdict in favor of the plaintiff for the full amount of the policy.

The counsel for the defendant resided in Syracuse where Julius Marqusee resided. Several persons interested in the defendant, and who were engaged in preparing the case for trial for the defendant, also resided in the city of Syracuse, and they and the counsel for the defendant went to and from Syracuse at the close of each day during the trial. Soon after the trial some one on behalf of the defendant interviewed Mr. Julius Marqusee in Syracuse, and ascertained from him that Jacob Simon had not paid forty or fifty cents a pound for the fifty-three cases of tobacco purchased from him, but that, in fact, he only paid fifteen cents a pound. This motion for a new trial is upon the ground that it would have been important to the defendant to have shown that fact upon the trial; that it discovered such fact after the trial, and it insists that with such fact before the jury, the result of the trial would have been favorable to the defendant.

It is well settled that in order to succeed upon a motion of this kind it is incumbent upon the moving party to establish that he could not have obtained the alleged newly-discovered evidence by reasonable diligence, prior to the trial. In this case, as before stated, the defendant was informed by the proofs of loss submitted by the plaintiff long before the commencement of the action, that he claimed to have purchased the tobacco in question from his brother Jacob. It was known by the defendant where Jacob resided. On the first day of the trial the defendant was informed that Jacob was then in the city of Utica. Defendant could have called him to the witness-stand, and learned from whom he purchased the tobacco in question, if it was deemed important. But, in addition, the whole case would seem to indicate that the defendant knew from whom Jacob claimed to have purchased the tobacco, and evidently it was not thought useful to ascertain the true facts in the case, until after the trial had closed. As appears by the record, the name of Julius Marqusee was frequently mentioned. It was alleged that he had sold direct to the plaintiff a considerable amount of the tobacco in dispute, and it would seem that under all the circumstances ordinary diligence would have suggested that Julius Marqusee be interviewed, and the facts which he knew in regard to the matter ascertained.

But in addition, however, it was distinctly sworn to by Jacob, on the morning of the 17th of May, that he purchased the tobacco in question from Julius Marqusee. There was ample time to have communicated with Marqusee, and procured his attendance as a witness. Strictly, in a case of this kind, what Julius paid to Marqusee for the tobacco would be of no consequence, but the issues in this action were such that it undoubtedly would have been competent proof in the case, which was known to defendant's counsel at the time. No effort was made to inquire of Julius Marqusee personally or by telephone, although only fifty miles distant from Utica, whether what Jacob testified to on the morning of the 17th day of May was correct or otherwise. If he had been brought to Utica during any part of May 17th, or upon the morning of the 18th, his evidence could have been given. No attempt was made to investigate as to where Jacob procured the fifty-three cases of tobacco, and how much he paid for it, although, as before stated, the principal defense of the defendant was to show that the value of the property destroyed was not equal to the amount which was claimed by the plaintiff.

Another rule equally well settled is that the evidence sought to be given must be of such character as would be decisive of the case, or such as to enable the court to say that if such evidence had been given the result would probably have been different.

Upon the whole case I cannot conclude that if the evidence in question had been given upon the trial, such would have been the result. Jacob did not state with any degree of positiveness what he paid to Julius Marqusee for the tobacco. First he said he did not know. He then said that he thought it was forty or fifty cents a pound. He stated, and the other witnesses called by the plaintiff testified, that the value of the tobacco purchased was forty-five cents a pound. Of course if it was, it was immaterial what he paid for it.

It would seem that if a new trial could be granted under the circumstances presented here, a new trial could be obtained in almost every case where, through some error or oversight, one of the parties failed to produce evidence which, in the light of knowledge subsequently gained, would possibly have changed the result. Such is not the rule, and a new trial should not be granted in any case upon the ground of newly-discovered evidence, unless the party has brought himself within the spirit, at least, of the well-established rules governing such applications.

It follows that the motion for a new trial should be denied, with $10 costs to the plaintiff. Order may be entered accordingly.

Ordered accordingly.

BENJAMIN S. PHILLIPS et al., Plaintiffs, *v.* LEANDER PHILLIPS et al., Defendants.

(Supreme Court, Oneida Special Term, January, 1898.)

Partition — Equities — Answers alleging payment of advances.

Where the plaintiff, after making the allegations usual in an action to partition lands, formerly of a decedent, asks as equitable relief that he be first paid out of the proceeds moneys which he individually paid to perfect the title of the decedent, his father, the defendants may properly interpose answers which, in substance, allege that the moneys claimed to have been paid by the plaintiff were in fact moneys of his father's estate or, in the alternative, that, soon after the plaintiff made his alleged payment, he received from his father's estate moneys belonging to it sufficient to reimburse him.

MOTION by plaintiff to strike out certain allegations of defendants' answer as irrelevant.

Miller, Fincke & Brandegee, for motion.

Dunmore, Sholes & Ferris, opposed.

MCLENNAN, J. This action is brought to partition certain lands situate in Holland Patent, Oneida county, N. Y. The complaint contains the usual allegations. It states the interests of the respective parties in the premises and how acquired, and that the property cannot be actually partitioned. It is also alleged that the plaintiff, for the purpose of perfecting the title of the property in question in his father, through whom all the parties claim to own, paid individually the sum of $600, as a part of the purchase price of said premises, and took a deed therefor in form to his father, one Leander Phillips; that said deed was not delivered until after the death of Leander Phillips, and was, therefore, void; that subsequently the grantors in said void deed conveyed all their right, title and interest in and to said premises to the plaintiff, in trust,

nevertheless, for the plaintiff and the other heirs-at-law of said Leander Phillips. The plaintiff asks that out of the proceeds of the sale of the premises in question, he be first paid the said sum of $600, paid by him as aforesaid, with interest thereon from the date of payment, and that the balance of the proceeds be divided according to the interests of the respective parties.

The defendants, by their answer, put in issue many of the allegations of the complaint, and deny that the plaintiff paid the said sum of $600, and set up the Statute of Limitations with reference to such payment, in case it was made by him.

They also allege that the plaintiff has been in possession of the premises in question since the 1st of May, 1892, and has collected the rents, issues and profits thereof, amounting to a large sum of money, and that he has never accounted therefor.

It is also alleged that at the time the plaintiff claims to have paid the said sum of $600, or soon thereafter, he received from the estate of his father, Leander Phillips, the common ancestor, moneys amounting to the sum of $1,725, and that he has never accounted to the defendants for the same or any part thereof. It is also alleged that soon after the death of Leander Phillips, the plaintiff received other large sums of money from the estate of said Leander Phillips, and that he has not accounted for any of said sums or any part thereof. The last two allegations of the answer the plaintiff asks to have stricken out as irrelevant.

The plaintiff asks the court to decree, in the exercise of its equity powers, that the money paid or advanced by the plaintiff for and on behalf of himself and the other defendants, in perfecting the title to the real estate in question, be first paid out of the proceeds of the sale of said premises.

The defendants in substance ask that such decree be not made, for the reason that the money so paid by the plaintiff was in fact the money of the estate, or if not, that soon after such payment was made by the plaintiff there came to his hands moneys belonging to the estate, in amount more than sufficient to pay the sum so advanced by him. In other words, the defendants asked to be permitted to prove that the plaintiff has been paid the sum alleged to have been advanced by him, by receiving moneys belonging to the estate of Leander Phillips in excess of said sum.

The plaintiff invokes the jurisdiction of a court of equity in his behalf, and he, therefore, submits himself to the same jurisdiction, and he should be compelled to act equitably with his cotenants.

In Freeman on Cotenancy and Partition, § 505, it is said:

"As the equities of the cotenants may arise from a great variety of circumstances, it follows that the assertion of these equities necessarily introduces in partition suits a great variety of issues, and calls for various allegations in the respective complaints and answers, which would not be required in an ordinary suit for partition not complicated by any special equities between the cotenants."

It seems to me clear that the rights of the parties to this action cannot be properly and equitably determined, if the defendants are precluded from making the proof which they seek to make under the allegations of the answer which are sought to be stricken out.

It follows that the motion should be denied, with $10 costs of motion.

Motion denied, with $10 costs of motion.

THE PEOPLE ex rel. THE NEWBURGH SAVINGS BANK, Relator, *v.* GEORGE W. PECK, Assessor of the City of Newburgh, et al., Respondents.

(Supreme Court, Orange Special Term, January, 1898.)

Taxation — The surplus of a savings bank is not taxable.

The relation of a savings bank to its depositors is that of debtor and creditor, and its surplus fund, accumulated under the Banking Law (Laws of 1892, chap. 689, § 123), in equity belongs to them; and hence it is, under the provisions of the Tax Law (Laws of 1896, chap. 908, § 4, subd. 14), exempt from taxation as "the deposits in any bank for savings which are due depositors;" nor can such a tax be sustained, under Laws of 1866, chap. 761, § 7, as amended by Laws of 1867, chap. 861, as one upon a franchise, as that statute is no longer in existence.

CERTIORARI to review an assessment of personal property for taxation.

Brown & Cassedy (Charles F. Brown and George W. Wickersham, of counsel), for relator.

C. L. Waring, Corporation Counsel, for respondents.

HIRSCHBERG, J. This is a trial of the issues raised by the respondents' return to a writ of *certiorari* granted for the purpose of reviewing an assessment of the relator's personal property in the sum of $414,849.01. It appears that the assessor of the city of Newburgh in July, 1897, assessed the relator as the owner of personal property of the value of $1,176,849.01, basing his action upon the contents of the report made by the relator to the superintendent of banks as of January 1st of that year. In this report the resources of the relator were stated to be

Bonds and mortgages		$2,516,000 00
Stock investments (par value, $3,339,191.37), market value		3,800,702 37
Banking-house (cost, $115,527.16), present value,		50,000 00
Other real estate (cost, $15,000), present value		16,531 82
Cash on deposit	$421,461 77	
Cash on hand	34,582 86	
		456,044 63
Accrued interest		97,011 91
Total resources		$6,936,290 73
and its liabilities to be		
Principal due depositors	$5,653,540 66	
Interest credited to depositors	105,901 06	
		5,759,441 72
Showing an apparent surplus of		$1,176,849 01

In August, following, the board of review, on complaint of the relator, reduced the assessment as above indicated, by deducting the sum of $762,000, such deduction being the aggregate of two items, viz.: $712,000 as the market value of United States bonds, included in the amount of stock investments, embraced in the report, and $50,000, the value of the banking-house.

On the trial, the relator contended, first, that its surplus fund was exempted from taxation by law, and second, that if such fund were taxable there were various deductions to which it was entitled other than those allowed by the board of review. A determination of the first claim in favor of the relator renders the examination of the second one unnecessary.

By section 3 of the Tax Law (chap. 908 of the Laws of 1896) it is provided that "All real property within this state, and all personal property situated or owned within this state, is taxable unless exempt from taxation by law." Section 4 of the same act enumerates the exemptions, among which is subdivision 14, which exempts "The deposits in any bank for savings which are due depositors, the accumulations in any domestic life insurance corporation, held for the exclusive benefit of the insured, other than real estate and stocks, now liable for taxation; and the accumulations of any incorporated co-operative loan association upon the shares of such association held by any person." This subdivision groups three distinct exemptions, two of which are in terms "accumulations," and the relator contends that the deposits referred to are designed to include not only the sums charged against the bank in its depositors' pass-books, but also the surplus fund accumulated by it under section 123 of the Banking Law (chap. 689 of the Laws of 1892), and which is accumulated, as stated in the act, for the security of such depositors, and "to meet any contingency or loss in its business from the depreciation of its securities or otherwise." This contention is in effect that the fourteenth subdivision deals with accumulations, which are for the exclusive benefit of the insured, of the shareholders in co-operative loan associations, and of the depositors in savings banks, all being akin in character, and the accumulations in the latter case being regarded as within the spirit and equity of the exemption of the specific deposits from which such accumulations arise.

The respondents appear to have been largely influenced, if not controlled, in making the assessment, by the decision of the Court of Appeals in the case of People ex rel. Savings Bank of New London v. Coleman, 135 N. Y. 231.

In that case the question before the court was whether a foreign savings bank was taxable upon its surplus invested in this state. The court assumed that such a bank was to be treated precisely as if it were a domestic corporation and consequently entitled to all the exemptions of the tax laws of this state. The exemption was claimed under the terms of chapter 456 of the Laws of 1857, which are substantially the same as in the existing Tax Law. The court held that such exemption applied only to the deposits for which the bank was then liable, and did not extend to the surplus. Chief Judge Earl, writing the opinion of the court, held that the exemption of the deposits was only in favor of the bank, and that

such deposits were, notwithstanding the exemption, still taxable as against the depositors. Judge Finch concurred in the opinion, but the other five judges concurred only in the result "on the ground that the shares of stock assessed were part of the bank's surplus," but expressed "no opinion as to the taxation of depositors on account of their deposits in savings banks." The court was, therefore, apparently unanimous in holding that under the exemption in the act of 1857, substantially similar in terms to the exemption now under consideration, a domestic savings bank was taxable upon its surplus fund, and that a foreign savings bank, while allowed all the exemptions which were conferred upon domestic institutions, was, nevertheless, properly taxable upon so much of its surplus fund as was invested in this state.

Following this decision, the Appellate Division of the first department, in the case of People ex rel. Groton Savings Bank v. Barker, 19 App. Div. 64, upheld an assessment of a foreign savings bank on bank stocks held by it in this state. That case, however, was unanimously reversed by the Court of Appeals in October, 1897 (154 N. Y. 122), and the authority of the prior decision was limited to the facts contained in the record in that case, and to the questions of law raised on its submission. It is to be noted that both cases related to savings banks organized under the laws of the state of Connecticut, and that Judge O'Brien who writes for the court in the later case was one of the judges who concurred only in the result in the former one. Referring in the opinion written in the Groton Bank case to the decision in the New London Bank case he said: "The result in that case very evidently proceeded upon the assumption that the surplus of a savings institution is not in any sense an obligation due to the depositors. So far as appears, there was nothing in that case to show that the depositors had any interest whatever in the surplus, or that they could ever be entitled to any part of it. It was treated as a part of the property of the corporation itself, quite independent of any interest in the depositors. By the fourth section of chapter 456 of the Laws of 1857, 'the deposits in any bank for savings which are due to depositors, and the accumulations of any life insurance company organized under the laws of this state, so far as the said accumulations are held for the exclusive benefit of the assured, shall not be liable to taxation, other than the real estate and stocks which may be owned by such bank or company, and which are now liable to taxation under the laws

of the state.' Under this statute it was held in the case referred to, that the deposits in savings banks were exempt from taxation against the bank. The bank stock of the relator was undoubtedly subject to taxation, but the assessment was subject to be offset by the debts and liabilities which it owed to depositors; and the question here is *whether the surplus of the relator was such a debt or obligation.* It would seem that in the decision of the above case the court assumed that depositors in savings banks have no interest in the surplus, and, as before stated, *there was nothing in the record to the contrary,* and, indeed, *the question was not raised in that case.* The facts in this case, however, are quite different, since it appears by the legislative charter itself, under which the relator exists as a corporation, that the income or profit which it derives from investments is to be divided among the persons making the deposits, their executors or administrators, and in just proportion, with such reasonable deduction as may be chargeable thereon. It also appears by the general statute of Connecticut regulating the operations of savings banks, that the net income of any savings bank in excess of a sum equal to one-eighth of 1 per cent. of its deposits actually earned during the six months last preceding, and no more, may be semi-annually divided among the depositors; but that no such dividend shall be made until the surplus shall have accumulated to an amount equal to 3 per cent. of its deposits; that such accumulation shall be kept as a contingent fund to the extent of 10 per cent. of its deposits, and any surplus beyond that shall be divided among the depositors entitled to such dividends, in sums of not less than 1 per cent. of its deposits. It is apparent from these statutes that the profits of savings banks, under the laws which governed the obligations and duties of this relator, *belong in equity to the depositors* and are *a part of the deposits* in the same sense that the stipulated interest is, or may be. It is true that they are not payable at the same time, or in the same way, and that they may be held by the bank as a fund until they have reached the specified amount. This is for the purpose of security to the depositors against unforeseen contingencies. But in the end, under the general spirit and purpose of the statutes, the depositors, their personal representatives or assigns, would be entitled, in equity, to the pecuniary benefits of such accumulated profits. The *so-called surplus* is, therefore, *within the equity* of the statute exempting depositors of savings banks from taxation. This surplus fund is a *debt, or obligation,*

due to depositors, just as much as the accumulated interest stipulated to be paid to them. *There is no more reason*, under these circumstances, *for taxing the surplus fund of a savings bank* than the accumulations of a life insurance company held for the exclusive benefit of the assured. The exemption in both cases is expressed in the same section of the statute, and in the same sentence; and in ascertaining the real condition of a savings bank for the purpose of such taxation as was made in this case, the surplus of the relator should not only have been included among its assets, but *among its liabilities and obligations as well.*"

I have quoted this opinion at length because the court elsewhere lays stress upon the fact that it is "not concerned with the question whether, under the laws of this state in regard to savings banks, such surplus is taxable or not." It was unnecessary there to consider the scope or meaning of the provisions of our laws as to the accumulation of surplus profits. It is necessary, however, to consider them in this case for the purpose of ascertaining whether they are so similar in spirit and effect to those in Connecticut as to render the reasoning of the Court of Appeals in the Groton Bank case controlling in the decision of this one.

As before stated, the provision for the accumulation of a surplus fund is contained in section 123 of the Banking Law. It provides that the trustees of every savings bank "shall regulate the rate of interest or dividends not to exceed 5 per centum per annum upon the deposits therewith, in such manner that *depositors shall receive* as nearly as may be, *all the profits* of such corporation, after deducting necessary expenses and reserving such amounts as the trustees may deem expedient as a surplus fund *for the security of the depositors*, which to the amount of 15 per cent. of its deposits, the trustees of any such corporation may gradually accumulate and hold, to meet any contingency or loss in its business from the depreciation of its securities or otherwise." The same section further provides that "the trustees of any such corporation whose surplus amounts to 15 per cent. of its deposits, at least once in three years, shall divide equitably the accumulation beyond such authorized surplus as an extra dividend to depositors, in excess of the regular dividend authorized." It seems to me beyond contention that these provisions impress the surplus fund of a domestic savings bank with the character of a debt or obligation due to the depositors in the same sense and to an equal degree as was asserted in the case of the Groton Bank. It is to be borne in mind that the

relation of the depositors and a savings bank is that of debtor and creditor. People v. Mechanics & Traders' Savings Inst., 92 N. Y. 7; Fowler v. Bowery Savings Bank, 113 id. 450; Jemison v. Citizens' Savings Bank, 122 id. 135. The bank has no capital or stock and no funds or resources of any kind excepting the money of its depositors and the increase of such money by investment. The function which the bank is to discharge is to invest judiciously the money received from its depositors, and to repay them as an entire class the whole amount so received, together with the earnings, subject only to the expenses of administration. The bank is in effect an incorporated trustee, serving without commissions, and the depositors are the sole beneficiaries. By statute the bank is directed to so regulate the rate of interest payable on the deposits that the depositors shall receive "*all* the profits" of the institution. The bank is not imperatively directed as under the Connecticut law, but is authorized, to reserve as a surplus fund such amount not exceeding 15 per cent. of the deposits as the trustees may deem expedient. The accumulations beyond such surplus fund are to be paid to the depositors by way of extra dividends; and the surplus fund is not to be accumulated with a view of depriving the depositors of their equitable ownership in it, but on the contrary it is to be held by the bank for their exclusive benefit in order to meet any contingency, loss or depreciation which might otherwise deprive the depositors of the amounts due them. Regarding the depositors as a class, it is evident that this surplus fund is as much an obligation of the bank to them, as are the sums paid in and credited on the pass-books. On the dissolution of the bank its distribution among such depositors would be decreed by a court of equity in accordance with settled principles regulating trust funds; but while the surplus is held by the bank as the legal owner the law recognizes and protects the interests of the depositors as the equitable owners. Every dollar received by the bank and not required to meet lawful expenses is owing to the depositors, and while some of it may be held until it reaches the specified amount, yet, "in the end, under general spirit and purpose of the statutes," in the language of Judge O'Brien, "the depositors, their personal representatives or assigns, would be entitled, in equity, to the pecuniary benefits of such accumulated profits."

Any other view would charge the legislature with providing for double taxation of the surplus funds of savings banks. By

chapter 761 of the Laws of 1866, it was enacted in section 7 that "The privileges and franchises granted by the legislature of this state, to savings banks or institutions for savings, are hereby declared to be personal property and liable to taxation as such in the town or ward where located, to an amount not exceeding the gross sum of their surplus earned," etc. This law remained in effect several years, during all of which time the exemption of deposits from taxation under the Law of 1857 was in force. If such exemption left the surplus fund liable to taxation on the ground that it was not included in the words "deposits in any bank for savings which are due to depositors" then this fund was taxable both as a fund and also as the measure of value of a franchise. A construction is to be favored which avoids such an injustice, and the conclusion is inevitable that when the legislature provided in 1866 for the taxation of the surplus as a franchise it did not regard such fund already taxable under the provisions of the act of 1857.

The learned counsel for the respondents further claims that even if it be held that the surplus of the relator is not taxable as personal property it is nevertheless taxable as a franchise under chapter 861 of the Laws of 1867 by which act section 7 of the act of 1866 above referred to was amended, and that accordingly the tax under review may be upheld as a tax upon the franchise of the relator. It certainly was not assessed as such; but waiving the question whether a tax levied as upon one kind of property may be enforced as a tax upon another and distinct kind, I do not think the contention sound. Chapter 761 of the Laws of 1866 is entitled "An act authorizing the taxation of stockholders of banks and the surplus funds of savings banks." It consisted of seven sections, the last of which, as has been said, related to the taxation of the "privileges and franchises" of savings banks. As originally passed the law permitted no deduction for the amount of United States bonds held by the banks. Chapter 861 of the Laws of 1867 amended the act of 1866 by providing that section 7 should be "amended so as to read as follows:" and in the rereading of the section inserted words permitting the amount invested in United States securities to be deducted from the surplus. The whole scope and purpose of the amendatory act was to grant the deduction specified. In 1875, by chapter 371 of the Laws of that year both the acts of 1866 and 1867 were repealed as a part of a revision designed to conform the charters of savings banks to a

uniformity of powers, rights and liabilities. By chapter 409 of the Laws of 1882 the statutes of the state relating to banks, banking and trust companies were again revised, and accompanying that act, and passed on the same day, was chapter 402 of the Laws of 1882 repealing certain acts and parts of acts. Chapter 402 expressly repealed chapter 371 of the Laws of 1875, and also expressly repealed chapter 761 of the Laws of 1866, but did not repeal chapter 861 of the Laws of 1867 amending the Law of 1866 in the matter of the government securities. The contention now is that by the repeal of the Law of 1875 which repealed the Law of 1867, the latter act is revived. I do not think such a result follows, at least not to the extent of reviving the act of 1867 as an independent statute creating a tax on privileges and franchises. The manifest intent to be gathered from the action of the legislature was to destroy the act which created the tax, without regard to subsequent intervening legislation which merely operated to reduce the amount of such tax. The repeal of an act creating a tax should certainly carry with it an amendment conferring an exemption. As has been said, the Law of 1882, was a revision of existing statutes, and the rule is a familiar one, that where a general revision of statutes is effected, covering the whole subject-matter, the revision is deemed to contain the entire law on the subject and to virtually repeal former enactments. Matter of New York Institution, 121 N. Y. 234. The Banking Law of 1892 was another such general revision, and article III, which assumes to embrace the law regulating savings banks, in no way indicates the revival of the law under consideration. Moreover the Tax Law of 1896, which was the result of a complete and general revision of the statutes of the state upon the subject of taxation, not only fails to embrace within its provisions the tax on franchises assumed to have been revived by the revival of the Law of 1867, but develops in article IX a complete scheme for a franchise tax on corporations, and by section 183 expressly exempts savings banks from the payment of such tax.

It follows from the views herein set forth that the assessment in question should be vacated and set aside as illegal and unauthorized.

Ordered accordingly.

Matter of Supplementary Proceedings, WILLIAM W. ZELIE and JOSIAH ZELIE, Judgment Creditors, *v.* JESSE O. VROMAN, Judgment Debtor.

(County Court, Schoharie County, January, 1898.)

Supplementary proceedings — Statement, of the residence of the debtor, in the disjunctive.

An affidavit for an order to examine a third party in supplementary proceedings, which states that an execution upon the judgment was delivered to the sheriff of the county "where the said judgment debtor then resided and where the judgment-roll was filed, then resided and yet resides, or has at the time of the commencement of these proceedings a place for the regular transaction of business," must be deemed to state the residence and place of business of the debtor in the disjunctive, and is insufficient as the defect is jurisdictional; and, therefore, a notice of motion to vacate the order need not point out the defect.

MOTION by a judgment debtor to vacate an order in supplementary proceedings for the examination before a referee of a third person.

E. E. Howe, for judgment creditors.

M. S. Wilcox, for judgment debtor.

LAMONT, J. This is a motion made by the judgment debtor to vacate the order made by me on the 11th day of December, 1897, for the examination before a referee, of a third person, to-wit, one William Vroman, in the above proceeding.

The order is sought to be vacated on the ground that the affidavit upon which the same was obtained is defective, in that, it states the residence and place of business of the judgment debtor, in the *disjunctive.*

These proceedings supplementary to an execution are authorized by chapter 17, title 12, commencing with section 2432 of the Code of Civil Procedure, and section 2458 declares when a judgment creditor is authorized to maintain either of the special proceedings in this article. And among other things, the execution must have been issued out of a court of record and either to the sheriff of the county in which the judgment debtor has at the

commencement of the special proceedings a place for the regular transaction of business in person, or if the judgment debtor is then a resident of the state, to the sheriff of the county where he resides, or * * * etc.

That part of the affidavit upon which the order was obtained and which the judgment debtor claims is defective under this section of the Code, reads as follows: "That an execution against the property of the said Jesse O. Vroman, judgment debtor, was thereafter and on the 19th day of January, 1897, duly issued out of a court of record, viz., the Supreme Court of Schoharie county, upon said judgment, and delivered to the sheriff of Schoharie county, where the said judgment debtor then resided, and where the judgment-roll was filed, *then resided and yet resides, or has at the time of the commencement of these proceedings a place for the regular transaction of business in person.*"

The attorney for the judgment creditors claims that the foregoing words in italics were printed in the affidavit, and were not intended to be any part thereof, although not erased, and that the allegation in the affidavit, to-wit: "Where the said judgment debtor then resided, and where the judgment-roll was filed," was sufficient to authorize the granting of the order.

I cannot assent to this, because that allegation refers to the residence of the judgment debtor on the 19th day of January, 1897, and as the affidavit was made on the 6th day of December, 1897, this allegation does not show where the judgment debtor resided at the latter date, which is a necessary requirement under section 2458.

Considering this affidavit as it actually appears, with these words in italics as a part thereof, it is clear to me that as it states the residence and place of business of the judgment debtor in the disjunctive, it is fatally defective, and for which the order ought to be vacated. Arnot v. Wright, 29 N. Y. St. Repr. 425; Collins v. Beebe, 54 Hun, 318-321; Leonard v. Bowman, 40 N. Y. St. Rep. 135.

It is a jurisdictional defect, not a mere irregularity. People ex rel. Williams v. County Judge of Cayuga County, 5 How. Pr. 446; Hinds v. Canadaigua & Niagara R. R. Co., 10 How. Pr. 448.

And, therefore, the notice of motion is not objectionable because it does not point out this defect. Blake v. Locy, 6 How. Pr. 109.

It is claimed by the judgment creditors, although no proof was furnished to sustain the claim, that the judgment debtor appeared before the referee and made no objection to the sufficiency of the affidavit. My idea is, that whether he did or not, makes no difference. It was a jurisdictional defect, and could not be cured by the appearance and silence of the judgment debtor. Sackett v. Newton, 10 How. Pr. 561.

The judgment debtor, also in aid of his motion, presented three affidavits, two of which are to the effect that at the time of the commencement of these proceedings, the judgment debtor was not a resident of Schoharie county, and had no place for the transaction of business therein. The other affidavit was to the same effect as to the third party, William Vroman.

The matters contained in these affidavits were not controverted. I am of the opinion that said order should be vacated with $10 costs of this motion to the moving party, the judgment debtor.

Order vacated, with $10 costs of this motion to the moving party.

Matter of the Petition of JEROME S. WARNER, as Administrator of the Estate of STEBBINS WARNER, Deceased, *v.* MARCIA S. BARTLE, as Administratrix of the Estate of DAVID W. BARTLE, Deceased, for the Payment of a Claim against the Last-named Estate.

(Surrogate's Court, Chenango County, January, 1898.)

Decedents' estates — Statute of Limitations.

A special proceeding taken, under the Code of Civil Procedure, § 2722, to procure the payment of a claim against the estate of a decedent, based upon a judgment recovered against him in justice's court, in 1877, docketed in the proper county clerk's office in 1880, and, by a transcript, in 1890, in the county where the proceeding was begun after his death intestate, in 1897, is barred by the Code of Civil Procedure, § 382, subd. 7, providing that an "action" upon a judgment or decree rendered in a court not of record must be brought within six years, as the word "action" includes a special proceeding. Code of Civil Procedure, § 414.

PROCEEDINGS under § 2722, Code of Civil Procedure to procure the payment of a claim against a decedent's estate.

J. H. & C. W. Stevens, for petitioner.

Samuel S. Stafford, for Marcia S. Bartle.

GLADDING, S. This is a special proceeding, commenced pursuant to section 2722 of the Code of Civil Procedure, by the petitioner for the payment of a claim alleged to be due and owing from the Bartle estate to the Stebbins Warner estate.

The administratrix of the Bartle estate resists the payment of the claim and asks for a dismissal of this proceeding upon the ground that the claim is barred by the statute of limitations, and she has interposed an answer to the petition setting up the statute of limitations as a defense to the prayer of the petitioner. The conceded facts are as follows: April 16, 1877, Stebbins Warner recovered a judgment against David W. Bartle for the sum of $150.63, which judgment was rendered in a Justice's Court of the county of Steuben. May 10, 1880, a transcript of said judgment was filed and the judgment docketed in the office of the clerk of the county of Steuben. January 15, 1890, a transcript from the docket in the Steuben county clerk s office was filed in the clerk's office of the county of Chenango and the judgment docketed in the latter county. November 4, 1883, said Stebbins Warner died, intestate, and the petitioner was thereafter, and on the 27th day of August, 1896, duly appointed administrator of the estate of said Warner. February 3, 1897, David W. Bartle died intestate, and on February 18, 1897, said Marcia S. Bartle was duly appointed administratrix of the estate of said David W. Bartle. July 2, 1897, the petitioner presented to the administratrix of said David W. Bartle, a claim for the amount of said judgment and interest, and August 1, 1897, said Marcia S. Bartle, as such administratrix, duly rejected said claim. Thereupon the petitioner duly commenced these proceedings as mentioned above.

The only question to be determined is a question of law, viz.: "Whether the petitioners' remedy to enforce the payment of said judgment in this special proceeding is barred by the statute of limitations? Section 382 of the Code of Civil Procedure prescribes what actions must be brought within six years after the cause of action has accrued, and the seventh subdivision is as follows: "7. An action upon a judgment or decree, rendered in a court not of record, * * * ." It is plain from this section that an *action* upon this judgment had been barred by reason

thereof for more than thirteen years before the death of the judgment debtor, and that the docketing of the judgment in the county clerk's office, by which it became a judgment of the County Court, does not prevent or remove that bar. Diffenbach v. Rock, 112 N. Y. 621; Townsend v. Tolhurst, 57 Hun, 42; Harris v. Clark, 65 id. 361. By the last paragraph of section 414 of the Code of Civil Procedure, the word "action," in section 382, is made to include a special proceeding. It covers the accruing of rights to institute a special proceeding. Conyngham v. Duffy, 125 N. Y. 200.

Under section 3334 and subdivision 20 of 3343, this proceeding is a special proceeding, and I am unable to conjecture any reason why it is not barred by the sections above referred to as effectually as an *action* upon the judgment.

The petitioner's attorney, however, bases an argument for upholding this proceeding, upon the fact that this judgment was recovered before the Code of Civil Procedure took effect.

The statute of limitations is applicable to judgments rendered before its passage. Acker v. Acker, 81 N. Y. 145; Brinckerhoff v. Bostwick, 99 id. 193; Viets v. Union National Bank, 101 id. 574.

But subdivision 3 of section 414 provides that the chapter on limitations is not applicable to a case "in which a person is entitled, when this act takes effect, to commence an action, or to institute a special proceeding * * * upon a judgment where he commences * * * the same, before the expiration of two years after this act takes effect."

The utmost that can be said in favor of a different rule applying, because this judgment was rendered before the Code of Civil Procedure went into effect, is that, by reason of the last above-quoted section, an action or special proceeding upon the judgment was extended for two years after September 1, 1880, which was the time when that act took effect. And it has been held that the old limitation is preserved only when invoked before the expiration of the two years. Conyngham v. Duffy, 125 N. Y. 200; Mason v. Henry, 83 Hun, 548; Cleveland v. Johnson, 5 Misc. Rep. 484.

Counsel for petitioner cites many cases where it has been held that the remedy to enforce such a judgment by *execution* is not barred by the six-year limitation. But no case is cited by him which holds that an action or special proceeding can be maintained

against the plea of the statute, when commenced more than six years after the rendition of such a judgment.

The amendment in 1894 to subdivision 7 of section 382, which excepts from the six-year limitation such a judgment where a transcript has been filed pursuant to section 3017, applies only to judgments rendered subsequent to the amendment; the language of the added words, "except where a transcript *shall be* filed," constituting the amendment, indicate that such was the intention of the legislature.

A statute of limitation which extends and enlarges the rights of the creditor acts prospectively only, unless a contrary intent is plainly indicated. Guillotel v. Mayor, 10 Abb. N. C. 318, and note, p. 322. But as to claims once barred by a statute (as was this claim before the amendment), so that the rights of the parties have become fixed by law, it is at least doubtful whether the legislature has power to destroy the debtor's existing defense. Knox v. Cleveland, 13 Wisc. 245; Woodman v. Fulton, 47 Miss. 682; Shriver v. Shriver, 86 N. Y. 580; Davidson v. Horn, 47 Hun, 53. Again, the application of this amendment has been passed upon by the third department, and a judgment recorded prior thereto was held not to be affected by the amendment. Becker v. Porter, 17 App. Div. 184.

My attention has not been called to any case holding that even supplementary proceedings upon such a judgment, commenced more than six years after its rendition, would not be barred by the statute of limitations, but counsel seems to assume that it has been so decided. If he is right in that assumption such a decision would, in my opinion, be some authority for his contention here. This special proceeding may not be more clearly within the six-year limitation than supplementary proceedings; because supplementary proceedings are special proceedings in the action. Smith v. Tozer, 42 Hun, 22; Hyatt v. Dusenbury, 12 Civ. Pro. 152; Graves v. Scoville, id. 165; Wright v. Nostrand, 94 N. Y. 31; and the last paragraph of section 414 includes, within the six-year limitation, a special proceeding in an action, as effectually as it does any special proceeding.

In Bolt v. Hauser, 57 Hun, 568, Dwight, P. J., intimates (*obiter*), that supplementary proceedings could be maintained upon such a judgment, and assigns as the grounds for such an opinion, that subdivision 1 of section 414 expressly excepts the case of an action or special proceeding for which a different limi-

tation is prescribed by law, and he asserts that "Section 2435 specially prescribes the limitation of ten years after the return of an execution for proceedings supplementary thereto."

That section provides that "*At any time within ten years* after the return * * * unsatisfied, of an execution * * * the judgment creditor * * * is entitled to an order requiring the debtor under the judgment or order, to attend and be examined," and section 2722, under which this proceeding is brought, provides that "In either of the following cases a petition may be presented * * * praying for a decree, directing an executor or administrator to pay the petitioner's claim * * * 1. By a creditor for the payment of a debt, * * * *at any time after six months* have expired since letters were granted."

If section 2435, above quoted, extended the time by "prescribing a different limitation," it is difficult to see why section 2722 does not also prescribe a different limitation.

But, in my opinion, neither of these sections were intended to enlarge or extend the statute of limitations prescribed by chapter 4 of the Code of Civil Procedure, and that each of these sections simply prescribe under what circumstances a certain step in such a proceeding may be taken, and the question whether the proceeding itself, as a whole, is barred by a statute of limitations must be determined by the provisions of chapter 4.

In other words, it is as though each of the sections, 2435 and 2722, had been prefaced by the words "If the creditor's claim is not barred by the provisions of chapter 4 of this act then," the proceedings authorized by those sections might be taken. The remarks of the court in Bolt v. Hauser, 57 Hun, 568, with reference to the time limited for commencing supplementary proceedings were *obiter*, as the decision was put upon another ground, and the case does not decide that supplementary proceedings upon a judgment rendered in a Justice's Court could, before the amendment of 1894 to subdivision 7 of section 382, be maintained after six years, as against the plea of the statute.

Section 380 provides "The following actions must be commenced within the following periods after the cause of action has accrued:"

Section 382. "Within six years * * * 7. An action upon a judgment or decree, rendered in a court not of record, * * * The cause of action, in such case, is deemed to have accrued, when final judgment was rendered."

Section 414. * * * "The word 'action' contained in this chapter, is to be construed, when it is necessary so to do, as including a special proceeding, or any proceeding therein, or in an action."

Reading "special proceeding" in the place of "action," in sections 380 and 382, and we have a plain provision of law to the effect that a special proceeding upon a judgment rendered in a court not of record must be commenced within six years of the time when final judgment was rendered.

This is a special proceeding, and supplementary proceedings are special proceedings in an action, as we have seen. Both are covered by the sections above cited, in my opinion, and the reference, in section 2435, to ten years after the return of an execution when an order in supplementary proceedings may be granted, and in section 2722, to six months after letters have been granted, when a petition can be presented, were neither intended, nor do they, make "a case where a different limitation is specially prescribed by law," referred to in subdivision 1 of section 414.

As before stated, they refer to particular acts that must have preceded, within a specified time, the commencement of each proceeding, respectively, but do not abrogate or change the rules of limitations prescribed by chapter 4 of the Code of Civil Procedure.

In Matter of Miller, 70 Hun, 62, it was held, that the provisions of the statute of limitations were applicable to proceedings under this section (formerly 2717, now 2722).

Before the death of the judgment debtor, the right to an action upon this judgment, and to a special proceeding thereon, and a proceeding in a special proceeding, or in an action (§ 414), was effectually barred by the statute of limitations. I am not convinced, and am unwilling to decide, that his death revived or created such a right against his estate.

Decreed accordingly.

Matter of the Judicial Settlement of the Account of JOHN B. WHITBECK, as Sole Surviving Executor of and Trustee Under the Last Will and Testament of DAVID WHITING, Deceased.

(Surrogate's Court, Greene County, January, 1898.)

Accounting for distribution — Former accounting under Code Civ. Pro. § 2742, not a bar to a claim — Equitable assignment.

Upon an accounting for distribution, under the Code of Civil Procedure, § 2743, it appeared that the will of a testator declared an equitable conversion of all his real into personal property except as to certain real estate devised to his wife for life, which was subsequently to be sold and divided, and gave each of his six children an equal share in all his property. In 1873 one of two acting executors loaned a part of the share of a minor to her brother, who gave her a note therefor and also an order on the executor for its payment from his share. In 1885 the surviving executor procured a judicial settlement of his account, under the Code of Civil Procedure, § 2742, to which the minor, then of age, was made a party, but did not appear personally, nor present her note and order, or advise her counsel that she had them. The decree entered, after reciting that the executors had made certain other subsequent advances to the brother of the minor upon pledges of his interest in the estate, charged them upon his share and authorized the surviving executor to retain a sufficient amount of it to pay or if, it was insufficient, to pay, in their order, the other subsequent advances which had been made. Held, that the advance made by the executor himself from the moneys of the minor was prior in time, was secured by the order, which amounted to an equitable assignment pro tanto of the share of the brother and was entitled to a preference; and that the decree of 1885 made when, as it appeared, there were no moneys to distribute and when others distributable had not been realized, was not a bar to the allowance of the claim of the minor in the proceeding for distribution, taken after the death, in 1894, of the widow, the time when a final distribution could first be made.

PROCEEDINGS on judicial settlement of the accounts of an executor.

A. Frank B. Chace & Sons, for executor.

Frank H. Osborn, for legatees.

SANDERSON, S. David Whiting died in March, 1872, leaving a last will and testament, which was admitted to probate by the surrogate of Greene county, April 10, 1872. Two of the executors named in the will, namely, Hiram Macy and John B. Whitbeck, qualified. The third executor, George Titus, failed to qualify. The testator left him surviving, his widow, Anna Whiting, and seven children, viz.: David T. Whiting, John F. Whiting, Addison E. Whiting, Ann Louisa Case, Armenia Whiting, Etta Whiting and Ira C. Whiting.

The will states that certain real estate having been conveyed to Ira C. Whiting, no provision is made for him. Armenia Whiting married since the date of the will, and is known in this proceeding as Armenia Wakeman. A portion of the real estate is devised to the widow during her widowhood, or life and occupancy. The executors are directed to invest a sufficient sum of money to produce an income of $1,400 a year and to pay the same to the widow during her life. The executors are also directed to sell all the real estate belonging to the testator, excepting that portion which was devised to the widow, as soon as conveniently could be done, after the testator's death. On the death of the widow or her remarriage, or ceasing to occupy the premises, the real estate which had been devised to her was directed to be sold, and converted into money. The will, therefore, makes an equitable conversion of the real estate into personal property. Subject to the above provision for the widow, all the property belonging to the testator is to be divided equally between the six children first above mentioned.

Hiram Macy, one of the executors, died in May, 1884, and John B. Whitbeck has continued to act as sole surviving executor and trustee under the will.

At the time of her father's death Etta Whiting was a minor. While she was yet a minor, the executor John B. Whitbeck loaned $1,500 out of her share of her father's estate, to her brother, David T. Whiting, who gave back his note which reads as follows:

"State of Illinois, Chicago, May 13, 1873.

"On demand for value received I promise to pay Etta Whiting, or order, $1,500 with interest from date at eight (8) per cent. per annum.

"DAVID T. WHITING."

On the back of the note the following words are written:

"Chicago, May 13, 1873. Mr. J. B. Whitbeck: Please pay to the order of Etta Whiting, fifteen hundred dollars with interest at 8 per cent. from date at the final settlement of the estate of David Whiting, deceased, unless sooner redeemed. The above order is to secure this note.

"DAVID T. WHITING."

The following payments are indorsed on this note: "Received on the within note June 1, 1875, $240; for two years' interest, August, 1876, $15, and September, 1876 $11; September, 1878, $2.75.

Mr. Whitbeck delivered this note with the order indorsed on it to Etta, and at the same time told her that he had let David T. have $1,500 out of her interest in her father's estate; that David T. had given his note as security and that she would be paid at the final settlement of the estate without fear of any loss. From what appears in the evidence the words "final settlement of the estate" evidently refers to the settlement that would be made after the death of the testator's widow. This $1,500 was charged to Etta in the accounts of the executor filed in this court in 1885.

The delivery of this note to Etta with the order on Whitbeck operated as an assignment *pro tanto* of David T. Whiting's interest in his father's estate and the knowledge and notice which Whitbeck had of this note and order made it binding on him to pay the same when due to the payee and to no one else. Brill v. Tuttle, 81 N. Y. 454; Lauer v. Dunn, 115 id. 405, 409.

A judicial settlement of the account of the executor was had in 1885. Personal service of the citation to attend this accounting was made on all the legatees including the executor of Hiram Macy, deceased. The executor appeared by counsel and the legatees appeared by counsel. No personal appearance was made by Etta Whiting nor was the note she held against David T. presented for payment in this proceeding. No information reached her counsel that she held such a note. At the time of this accounting Etta was of full age. On the 21st day of September, 1885, a decree was entered judicially settling the account of John B. Whitbeck and Hiram Macy, executors of and trustees under the will of David Whiting, deceased, and of John B. Whitbeck as survivor of said executors and trustees. In the summary of the account included in decree Whitbeck is charged with $102,022.92

and is credited with $106,388.42, leaving a balance of $4,365.40, due from the estate to Whitbeck; the estate of Hiram Macy is charged with $12,328.55 and is credited with $11,436.96, leaving a balance due the estate of Whiting of $891.59. The widow had been paid the full amount of the annuity due her and each of the legatees had been paid $4,710 excepting John F. Whiting and Anna L. Case, to each of whom had been paid $4,610 " on account of their respective distributive shares in the estate of their father." A number of assets are mentioned in the decree as still in the hands of the executor which had not yet been converted into money and were not, therefore, ready for distribution. The balance due Whitbeck, as settled and allowed, amounting to $6,569.59 with interest, was charged upon the estate and Whitbeck was directed to retain the same out of the proceeds of the estate unadministered and undisposed of, when and as received. Then follows a provision which as it brings up the principal question in dispute is given in full:

"And it appearing that on the 15th day of June, 1873, at Chicago, in the state of Illinois, the said John B. Whitbeck advanced to the said David T. Whiting the sum of $2,000 upon his promissory note dated on that day at Chicago aforesaid for $2,000, payable five years from the date thereof, with interest thereon at the rate of 8 per cent., payable semi-annually, secured by a transfer and pledge of his share and interest in the estate of David Whiting, deceased, and upon which there was paid May 28, 1875, the sum of $110 and July 12, 1877, the sum of $100; and that thereafter and on the 1st day of February, 1876, the said executors and trustees, John B. Whitbeck and Hiram Macy at Geneva, in the state of Wisconsin, out of the funds of the estate of the said David Whiting, deceased, advanced to said David T. Whiting a further sum of $1,750, upon his certain other promissory note in writing, dated on that day at Geneva, aforesaid, for $1,750 payable on demand, with interest at the rate of 10 per cent. per annum secured by a transfer and pledge of his remaining share and interest in said estate of David Whiting, deceased; it is further ordered, adjudged, and decreed that the said several sums so advanced to said David T. Whiting as aforesaid, with interest on said sums respectively from the time of such advancements respectively at the rates respectively above stated less the payments above mentioned as having been made on one of such advancements, be a charge upon the share and interest of the said David T. Whiting in the said

estate of the said David Whiting, deceased; and that the said John B. Whitbeck be, and he is hereby authorized to retain sufficient of such share and interest to pay the full amount principal and interest remaining unpaid upon the same and each of the same; and that in case the said share and interest of the said David T. Whiting shall not be sufficient to pay both of the same with interest as aforesaid in full then that he be and is hereby authorized and directed to apply the same thereto, in the order above stated and in the order in which advancements were made as aforesaid. And that all sums applied to said note for $1,750 and the interest thereon be held and treated as part of the estate of said David Whiting, deceased, and disposed of by such executor, as such."

There were no moneys on hand ready to be distributed at the time this decree was made, and no provision for distribution was made except the provision for the executor Whitbeck to retain in his hands sufficient funds of the estate and of the shares of the legatees to whom advancements had been made over and above what had been received. In fact there is nothing attempted to be done in the decree except the settlement of the executor's account. The widow of David Whiting died August 4, 1894, and the surviving executor now asks that his account as executor and trustee be settled and a distribution made of the funds in his hands.

In this proceeding Etta Whiting produces her note and the order indorsed thereon made by David T. Whiting and asks that it be paid as a first lien on the share of David T.

The executor objects to her claim on the ground that the decree made in September, 1885, is conclusive as to his rights and is a bar to recovery by Etta at least as a prior claim to his. The executor, during the course of his administration, has paid or substantially so, all that was found due him in the decree made in 1885, but no payment has been made on his advances to David T., for which he was secured by the notes of David T., and by an assignment of his share in his father's estate. All the funds belonging to the estate of David Whiting remaining to be distributed on this accounting, excepting a few hundred dollars, have been deposited in bank under a stipulation and are to be drawn out only on an order of this court. No payments have been made to any of the legatees since the last accounting, except to John F. Whiting, to whom has been paid $100. Presumably at the time these notes were given it was thought that the share of David T. in his

father's estate would be sufficient to pay them all when the time arrived for distribution. It is now certain that the amount due on David T.'s share will be insufficient to pay either one of these notes with the interest. The note to Etta as well as the order indorsed on it are prior in date to either of the advances made by the executors to David T., being prior in time they are also prior in right. The executors had knowledge of the order on them to pay to Etta out of David T.'s share the amount due to her on his note. They had, therefore, no right to make advances either out of money belonging to the estate or out of their own funds on David T.'s share which could be a prior claim to hers on his interest in his father's estate. The only objection made to the payment of her claim on the distribution to be made on this accounting is that the decree made in 1885 is conclusive on her and a bar to her claim.

There are two adjudications made by a surrogate in the settlement of an estate; one is an adjudication on the settlement of the executors' or administrator's account; another is on the distribution of the funds of the estate. The questions arising on these adjudications are different, and the force and effect of the decree as it relates to the settlement of the executors' account, or as it relates to the distribution of the fund among those who are entitled to it, also differ. These adjudications may be made in separate decrees or they may be made in the same decree. Johnson v. Richards, 3 Hun, 454, 457. The Code has also carefully preserved this distinction. Section 2472, subdivision 3, gives surrogates jurisdiction to settle the accounts of executors, administrators and testamentary trustees, and by subdivision 4 of the same section, "to enforce the payment of debts and legacies; the distribution of the estate of decedents." Section 2742 provides for the judicial settlement of the account of an executor or administrator and states what is the force and effect of a decree upon such settlement. Section 2743 provides for a distribution of the estate to the persons who are entitled thereto according to their respective rights. The force and effect of such a decree is also stated. The decree made by the surrogate in 1885 was a judicial settlement of the accounts of the executors. It showed a large amount due to the executors by the estate and that there was no money in the hands of the executors to pay this indebtedness. There was no money in the hands of the executors for distribution and no provision was made in the decree for distribution among the legatees. The decree

directs the surviving executor to retain in his hands any money that may come into his possession for the purpose of paying the balance found due him; this he could have done without such a provision in the decree. The decree also permits the executor to reimburse himself from David T.'s share for the amount he had advanced to him. This also the executor could have done without a decree provided there was anything coming to David T. from the estate, which he had a right to receive. The executor stood in David T.'s shoes. If David T. had nothing coming to him out of the estate which he had a right to receive, the executor could not reimburse himself at the expense of a prior claimholder, of whose claim he had due notice. The question which arises on this accounting was not an issue in the former proceeding. No question as to the priority of the executors' advances over the assignment of David T.'s share to Etta was made before the surrogate at that time. Under these circumstances is the decree of 1885 a bar?

A decree settling an executor's account is conclusive only in regard to the facts specified in the statute. Section 2742, Code of Civil Procedure, provides that a judicial settlement of an executor's account by a decree " is *conclusive* evidence against all the parties who were duly cited or appeared, and all persons deriving title from any of them at any time, of the *following facts, and no others:*

" 1. That the items allowed to the accounting party, for money paid to creditors, legatees, and next of kin, for necessary expenses, and for his services are correct.

" 2. That the interest charged to the accounting party and embraced in his account is all for which he is legally accountable.

" 3. That the money charged to the accounting party as collected is all that was collectible, at the time of the settlement on the debts stated in the account.

" 4. That the allowances made to the accounting party for the decrease and the charges against him for the increase in the value of property were correctly made."

It is evident that the decree made in 1885 is not a bar to Etta's claim unless it is embraced within the first subdivision of the above section. No objection was raised on the former accounting and none is raised on this to the correctness of the items allowed to the executor for the money paid to the legatees, including the advances to David T. The decree does not attempt to determine

the amount of David T.'s share nor what portion, if any, of his share belongs to others. The rights of assignees of legatees can only be ascertained and determined when an executor has money in his hands ready for distribution, as provided for in section 2743 of the Code. The life estate of the widow was outstanding in 1885 and there was no money in the hands of the executor, therefore a decree for distribution could not then be made. The order on the executors to pay Etta out of David T.'s share would be due only on the settlement of the estate of which order the executors had knowledge. The settlement made in 1885 was not such a settlement as was contemplated in the order. The decree did not determine what Etta's rights, if any, were in David T.'s share. It is very doubtful whether she had a right to have them determined at that time. The account of the executors was settled and that is all that was determined by the decree. No form of words used in the decree can give it greater force and effect than that which the statute gives it. In Johnson v. Richards, *supra*, the court says: "It is obvious that a decree on final settlement determines nothing beyond the amount received and paid out by the executor and (unless the two accounts balance each other) the balance in his hands belonging to the estate, or due to him from it."

There is no provision in section 2742, for the distribution of any portion of the estate or for the determination of the rights of the respective parties as individuals between each other. Section 2743 is the only one that provides for the distribution of the funds of the estate and for the settlement of the rights of the parties unless we except the general power given in section 2472. By section 2743 when an account is judicially settled "and any part of the estate remains and *is ready to be distributed* to the creditors, legatees, next of kin, husband or wife of the decedent, or their assigns, the decree must direct the payment and distribution thereof to the persons so entitled according to their respective rights." This is the first and only accounting in which any of the funds of the estate have been ready to be distributed. How then can I forbid Etta, as assignee of David T., from coming in and asking that she be paid the share of David T., out of any portion of the estate which is now ready to be distributed? Under the strong light that section 2743 throws upon it this question admits of only one answer. Her claim cannot be shut out. The decree of 1885 is not a bar.

My attention has been called to section 2812 of the Code of Civil Procedure. It is claimed that on an accounting by a trustee

the rule is different from what it is on an accounting by an executor. But section 2811 makes section 2743 applicable to an accounting by a trustee. Besides the account settled in 1885 principally relates to the account of the executor. All that portion of the decree, then made, which relates to the payments made to the legatees, including the advances to David T., is in settlement of the executor's account, with which the trustee as such has nothing to do.

It would be misleading to reason from an ordinary judgment in a court of record to that of a decree in a Surrogate's Court. Not all matters which could have been litigated upon an accounting and settled in a surrogate's decree are barred from being put in issue on a subsequent accounting.

In Van Rensselaer v. Van Rensselaer, 113 N. Y. 207, the executor had had a judicial settlement of his account. Upon that accounting against the objection of a legatee the executor was allowed to exclude from his account the proceeds of farm sales and the account was settled without regard thereto. No appeal was taken from the decree. Held, that the decree of the surrogate upon such settlement was no bar to an action to recover a legacy charged upon the proceeds of the sale of a farm. The same objection was urged in that case as is urged in this proceeding, namely, that the decree was conclusive upon the issues raised in the action. The court says (p. 214), "That decree has no effect upon what was not involved in the settlement." The Code of Civil Procedure (§ 2742) provides "upon what facts the judicial settlement of an executor's account shall be conclusive and expressly excludes all others." Many matters which might have been included in an account are not by reason of a decree concluded from being brought in issue on a subsequent accounting.

The force and effect of a surrogate's decree made upon the judicial settlement of the account of an executor or administrator is well considered in Bank of Poughkeepsie v. Hasbrouck, 2 Seld. 216. The facts of that case bear a close resemblance to those of the one in hand. The above case was decided while the provisions of the Revised Statutes in relation to the settlement of executors' and administrators' accounts were in force. But for all the purposes of the question arising in this proceeding there is no practical difference between the Revised Statutes and the Code of Civil Procedure. In the bank case the question was between the assignee of a creditor and the administrator, here it is between the

assignee of a legatee and the executor. In both cases the executor and administrator claimed as individuals to be entitled to the fund. The bank was transferee of a note made by the testator. The administrators advertised for creditors to present claims. The payee mentioned in the note presented a claim for the note, the bank did not. The administrators had no knowledge that the bank was the owner of the note. In the case in hand, Whitbeck, one of the executors, had knowledge of the assignment to Etta. The administrators made partial payment on the note, and finally one of the administrators became the owner of the note. In this respect this case tallies with the one in hand, except that when payments were made by Whitbeck to David T., he had knowledge of the assignment to Etta. After the expiration of eighteen months the administrators of the deceased maker of the note had a judicial settlement of their account. The bank had legal notice of this proceeding. The payee of the note appeared in the proceeding, but the bank did not. The payee stated that the note had been mislaid so that he could not produce it. In the final account the note was credited to the defendant, who was one of the administrators, and the decree directed that the creditors should be paid at the rate of sixty cents on the dollar. The defendant received the proportionate amount due on this note. The decree which was here made, was made not only for the settlement of the executors' accounts, but also for the distribution of the funds in the administrators' hands. In an action brought by the plaintiff to recover of the defendant the amount received by him on this note, it was held that the surrogate's decree was not a bar, and that the plaintiff was entitled to recover. It was claimed that the bank was negligent in not presenting its claim, pursuant to the notice to creditors; second, that the defendant had no knowledge that the bank was the owner of the note, and, therefore, the administrators had a right to make payments on the note; and, third, that the bank was concluded by the decree.

So, here, it is claimed that Etta was negligent in not presenting her claim at the time of the former accounting; but whether she was or not, the statute gives the surrogate the power to decide who are entitled to the fund in a decree for the distribution of the funds then on hand. It was said in the bank case that the fact that the payee did not present the note was a suspicious circumstance and should have put the administrators on inquiry. Still stronger is the present case, for Whitbeck had actual knowledge of the assign-

ment to Etta, and that to the extent of her interest in David T.'s share; the latter had no right to assign his share. Any advancement therefor made by the executors would be at their individual risk.

In Sheldon v. Sheldon, 33 N. Y. St. Repr. 754, the plaintiff held a claim against her husband's estate. In 1883 there was a judicial settlement of the executor's account, to which proceeding the plaintiff was a party. A decree for the distribution of the funds then in hand was made. No provision for the payment of the widow's claim was made. In an action subsequently brought by the widow for an accounting by the executor it was held that the surrogate's decree was conclusive only so far as it went. It did not prevent the widow from sharing in any future assets when ready for distribution. This case is sufficient authority to show that a claimant, though he has neglected to present his claim at one accounting, is not shut out from presenting it at another and sharing in the assets of the estate then on hand and ready for distribution. In the Matter of White, 6 Dem. 375, it was held that "a decree judicially settling an executor's or administrator's account which includes a bill for expenses of administration, shown to have been only partly paid, protects the accounting party as to that part only of the bill so paid, and leaves the question of the propriety of further payments on account thereof open for future settlement." In Bowditch v. Ayrault, 138 N. Y. 222, it was held that where trustees had had several accountings and paid out money in pursuance of the decrees which had been made, but upon an erroneous theory as to who were entitled to take, the decrees which had been made were "conclusive upon all past transactions and payments covered by them. They form no bar, however, to the proper decision of the question now presented as to the distribution of the property now in the hands of trustees." So in the present case we see no sufficient reason why the decree made upon a former accounting when all the facts of the case were not before the surrogate should prevent a decree from being made on this accounting as to the funds now in the hands of the executor and trustee such as will be just and equitable.

The conclusion is that the decree made in 1885 is not a bar to Etta's claim. Her right to be paid first out of David T.'s share depends upon the question whether she has a superior right to it. It is conceded that her claim has priority in date, and the proof is that Whitbeck had knowledge of the assignment made to her,

before either of the advances by him had been made to David T. The direction is, therefore, given that she be paid first out of David T.'s share.

Decreed accordingly.

WILLIAM J. LENNON, Respondent, *v.* HOWARD K. LYON, Appellant.

(County Court, Greene County, January, 1898.)

Promise for the benefit of a third person, a firm creditor — Consideration — Intention to benefit third party.

A written agreement by which a partner, for "a good and valuable consideration" received of the committee of the person and estate of another partner, promises to pay the firm debts and to indemnify the committee against them, when accompanied by no proof of a transfer of the firm assets to the promisor nor of any consideration moving to him beyond that recited, is not available to a third party, a firm creditor, to whom it would be beneficial, as the burden is upon him to show that it was the intention of the parties to the agreement, which by its terms indemnifies the committee alone, that it should also benefit firm creditors.

APPEAL from a judgment of a Justice's Court in favor of plaintiff.

James B. Olney, for appellant.

J. A. Griswold, for respondent.

SANDERSON, J. It is claimed on the part of the plaintiff that this case comes within the principle of Lawrence v. Fox, 20 N. Y. 268. I think it does not. In the case relied on one Holly owed the plaintiff $300. At the request of the defendant Holly loaned him $300, at the same time telling him that he was indebted to the plaintiff for the same amount, and had agreed to pay it to him the next day. In consideration of this loan the defendant agreed to pay to the plaintiff the said sum of $300. The court held that an action would lie on the part of the plaintiff against the defendant to recover the amount due the former from Holly. Here we have a consideration moving from the promisee to the prom-

isor. Second, the fund which would have satisfied Holly's creditor had been transferred to the defendant on his promise to pay it to the plaintiff. To a certain extent the plaintiff was interested in this fund, of which his debtor deprived himself. In the case in hand both of these points are missing. All the evidence we have of a consideration for the promise of the defendant to pay the indebtedness of the late firm of Lyon & Lennon is contained in the written agreement known as exhibit "A," and which reads as follows: "For a good and valuable consideration received of Charles N. Lennon, committee of the person and estate of Walker Lennon, I do hereby covenant and agree with said Charles and Adelbert as such committee and with said Walker and each of them to pay and procure to be discharged all claims and demands of every and all person and persons against the late firm of Lyon & Lennon or against said Walker and said Lyon jointly, and to indemnify and to save said Walker and said Charles and Adelbert harmless from the payment of all such claims, except any claims of Julia A. Lennon and Mattie Lennon or either of them.

"Dated October 17, 1895. "HOWARD K. LYON."

A consideration in law consists of either a benefit to the promisor or of injury to the promisee. Under which head the consideration mentioned in this agreement comes is not revealed by anything contained in the return. The promise to pay the indebtedness of the firm of Lyon & Lennon for "a good and valuable consideration," is valid and binding as between the parties to the agreement, but can the plaintiff enforce it? The latter would be benefited by the performance of this agreement but is not a party to it. Without knowing what the actual consideration is we cannot make out, as we can in Lawrence v. Fox, *supra*, that it was intended by the agreement to benefit the plaintiff or any of the creditors of Lyon & Lennon. The incidental benefit which would accrue to the creditors from the performance of the agreement is not sufficient to uphold an action by any one of them against the defendant. It must be the intention of the agreement to benefit the creditor of the promisee in order to support an action by the creditor against the promisor.

In Berry v. Brown, 107 N. Y. 659, it was held that "an agreement by a third person with an outgoing member of a firm to relieve him from and indemnify him against the firm debts, where no consideration passed to the promisor, cannot be enforced

against him by a creditor of the firm." The consideration in this case was one of harm to the promisee. He had transferred his interest in the assets of a firm to the wife of the defendant, and the promise of the defendant was based upon this transfer. The court says: "As the sale was not made to the defendant and no consideration whatever passed to him, these plaintiffs, strangers to the agreement, cannot enforce it against him." As between the parties the consideration was sufficient. In cases of this class the consideration plays an important part. I have found no case in the books where an action was brought by a stranger to the contract for the enforcement of it, but what the consideration was proved on the trial. The case in hand is unique in this respect.

It would be an unwarranted extension of the principle decided in Lawrence v. Fox to say that every promise to pay the debt of another to a third person, not a party to the contract, when founded upon a consideration sufficient to bind the parties to it, will support an action of such third person against the promisor to recover the indebtedness of the promisee to the plaintiff. Garnsey v. Rogers, 47 N. Y. 233. In this case it was stipulated in a mortgage that the mortgagee should pay certain prior mortgages on the premises covered by this junior mortgage. The prior mortgagees sought to recover of the defendant on the promise contained in the mortgage. The court held that they could not do so. The consideration contained in the mortgage was sufficient to uphold the promise as between the parties to the instrument; but the mortgagor alone could enforce it. The principle upon which this case was decided is that the promise contained in the mortgage was made for the benefit of the mortgagor and not for the benefit of the prior mortgagees. The court says (p. 241): "If such a contract could be enforced by the creditor who would be incidentally benefited by its performance, every agreement, by which one party should agree with another, for a consideration moving from him, to become security for him to his creditors, or to advance money to pay his debts, could be enforced by the parties whose claims were thus to be secured or paid. I do not understand any case to have gone this length." In remarking upon the case of Lawrence v. Fox, the court says (p. 240): "I do not understand that the case of Lawrence v. Fox has gone so far as to hold that every promise made by one person to another, from the performance of which a third person would derive a benefit, gives a right of action to such third party, he being privy neither

to the contract or to the consideration. To entitle him to an action, the contract must have been made for his benefit. He must be the party intended to be benefited; and all that the case of Lawrence v. Fox decides is, that where one person loans money to another, upon his promise to pay it to a third party to whom the party so lending the money is indebted, the contract thus made by the lender is made for the benefit of his creditor, and the latter can maintain an action upon it without proving an express promise to himself from the party receiving the money."

But while a stipulation contained in a mortgage to pay prior mortgages on the same property covered by said subsequent mortgage cannot be enforced by the prior mortgagees, yet a provision contained in a deed of conveyance for the grantee to pay mortgages covering property so conveyed can be enforced by the mortgagees. Halsey v. Reed, 9 Paige, 445; Burr v. Beers, 24 N. Y. 178. The consideration upon which the promise rests in this class of cases is the conveyance of the premises which the mortgagees hold as security for the payment of their claims. There is a privity in the consideration between the grantee and the mortgagees. The same principle holds true in that large class of cases where a retiring partner transfers the assets of the firm to the continuing partners, who agree to pay the debts of the old firm. Here the consideration for the promise is the transfer of the property on which the creditors of the old firm had a right to rely for the payment of their claims against such firm. Such an agreement would be assumed to have been made for the benefit of the creditors of the old firm. A right of action would thereafter exist in each creditor to enforce the contract. In King v. Israel, 19 Misc. Rep. 159, 161, the court says: "Where the agreement to assume the debts formed a part of the transfer of all the assets to which the creditors of the old firm might look for the satisfaction of their claims, and the contract of assumption having been sufficiently comprehensive to cover the plaintiff's claim, they were entitled to adopt it, as made for their benefit, and maintain an action upon the promise." So in Griffin v. Hungerford, 19 Misc. Rep. 684, 685, it was held, that where the continuing partner upon a dissolution assumes the debts of the firm and receives its assets, the creditors of the firm have a right of action against the continuing partner. Assuming the debts and receiving the assets are closely connected where a right of action exists in behalf of a third party who is not a party to the agreement. The reason is that in such

cases an inference of fact arises that the agreement to pay the debts of the old firm was intended to benefit such third persons. In Wainwright v. Queens County Water Co., 78 Hun, 146, at pages 149 and 150, the court says: "But it is now settled that, to bring a case within the rule, the contract must not only be beneficial to the third party, but it must have been intended for his benefit by the contracting parties."

For additional proof that the views above expressed are correct, I cite Arnold v. Nichols, 64 N. Y. 117. At page 119 the court says: "Bowen transferred to the firm the assets to which his creditors had the right to look for the payment of their claims, and hence the promise of the firm to pay such claims must be deemed to have been made for their benefit. It was not made to exonerate Bowen from the payment of his debts, and not primarily nor directly for his benefit, as his property was to be taken to pay the debts, and he was still to remain liable as one of the principals to pay them." So, also, in Hannigan v. Allen, 127 N. Y. 639, the court says, at page 642: "As we have seen, each partner contributed to the capital of the firm the stock of goods he had on hand, on which there were amounts owing for purchase money. The goods having been transferred to the firm, and the firm having assumed and agreed to pay the balance of the purchase price unpaid, the agreement of the firm will be deemed to have been made for the benefit of the creditors holding such claims, and an action may be maintained by such a creditor against the firm upon such agreement."

I have found no case where one of the partners has agreed to pay the partnership debts, and an action allowed to be maintained upon the agreement by one of the creditors who was not a party to it, where it was not shown that a transfer of the assets of the firm had not been made to the promisor. The language of the courts is not always harmonious upon this subject; but when what is said in the opinions is construed in connection with the facts of each case, it will be found that not much discordant action exists.

In the case in hand the consideration for the promise to pay the debts of the firm, while it is good and valuable as between the parties to the agreement, throws no light upon the question whether it was intended thereby to benefit the creditors of the firm. On the contrary, the agreement says that the defendant, Lyon, shall indemnify and save said Walker and said Charles and Adelbert Lennon harmless from the payment of all claims against

the late firm of Lyon & Lennon. The inference from this clause would be that the sole intent of the agreement was to indemnify the committee against loss from the claims of creditors and not to benefit the firm creditors. It was the duty of the plaintiff to show by reasonable proof, either by direct evidence or by circumstantial proof, that it was the intention of the parties to benefit the firm creditors. The burden was on the plaintiff to make out a case. This he has failed to do. The judgment of the justice is reversed with costs.

Judgment reversed, with costs.

FREDERICK G. HOBBS et al., Respondents, *v.* GEORGE EDGAR et al., Appellants.

(City Court of New York, General Term, February, 1898.)

Brokers — Commissions.

Brokers who have been the procuring cause of a sale of real estate are entitled to commissions.

APPEAL from a judgment in favor of plaintiffs entered upon a verdict.

Philbin & Beekman, for appellants.

Leventritt & Nathan, for respondents.

FITZSIMONS, Ch. J. I think that the jury was justified upon the evidence submitted in deciding that the plaintiffs were the brokers who procured for the defendant, Mr. Flint, who purchased of them the premises in Sixty-ninth street, and, therefore, they were entitled to the usual commissions.

The force of the insinuation advanced by the defendants that the sale in question was induced by our Mr. Phillips, also a broker, in my opinion, is dispelled by the testimony of Mr. Flint, the purchaser, who testified: "I went with Mr. Phillips to see some property that he had for sale; after that I suggested that my wife (who was then with Mr. Flint) should examine the Sixty-ninth street house. Mr. Phillips suggested that he would go around there with me. I told him that I had already

seen that house. He (Mr. Phillips) said: 'I will go there if you have no objection,' * * * I said I had seen the house already, through Mr. Birch (plaintiff's copartner) a few days before and there was no need of his going, unless he wanted to go; and then Mr. Phillips again said: 'If you have no objection I will go down with you,' and I said 'No.'" Mr. Flint said: "My going to see the Sixty-ninth street house was of my own volition, and not Mr. Phillips'."

Because of this testimony, I say that the defendants' insinuation (because their claim, that Phillips was the procuring cause of the sale, amounts to nothing more than an insinuation), that Phillips was the broker in the transaction in question is rendered of no effect. It is plain from the evidence that Birch was the broker, and the only broker in the matter, and that the services (if any) rendered by Phillips were rendered as a friend of Flint, and as far as the defendants were concerned, that he was a mere intruder.

Finding no error, the judgment must be affirmed, with costs.

CONLAN, J., concurs.

Judgment affirmed, with costs.

RACHEL DELMAGE, Respondent, *v.* MOSES R. CROW, Appellant.

(City Court of New York, General Term, February, 1898.)

1. **Assault and battery — Words accompanying an assault — Damages.**

   A complaint for an assault and battery may properly include slanderous words, spoken by the plaintiff to the defendant, at the time of the assault, as these characterize its malicious intent and proof of them is competent upon the question of damages.

2. **Same — Release — Duress.**

   Whether a release of a cause of action was executed under duress is a question for the jury, and if they find duress, the release is not a bar.

APPEAL from a judgment in favor of plaintiff entered on a verdict.

Franklin Bien, for appellant.

Wilder & Anderson, for respondent.

FITZSIMONS, Ch. J. The complaint herein is certainly one for assault and battery and the words, which defendant's counsel claims set forth a cause of action for slander, were not, in our opinion, pleaded for any such purpose, but merely allege an incident of the assault and were set out for the purpose of showing the malicious and evil intent and design of the defendant towards the plaintiff at the time he committed the assault.

Viewed in that light, we think that such words were properly embraced within the complaint, as it was proper and permissible for the trial justice to permit the utterance to be testified to upon the trial, so as to enable the jury to fix the proper rate of damages to be awarded to the plaintiff.

As to the alleged release, we think it was proper for the trial justice to submit to the jury the question, "Was it obtained under duress?" It appears that the plaintiff was informed that unless she signed the same, she would be kicked off the car. She was a young woman, in a strange land, among strangers, apparently with no one holding out a helping hand to her, and knowing well what would happen to her if she did not sign said paper.

I think, under the circumstances and the threat made against her, it was proper to let the jury determine as a matter of fact whether or not in signing said paper she acted freely or was under duress.

We agree with the defendant's attorney, that under the evidence the jury might just as easily have decided in defendant's favor as in plaintiff's favor, because the evidence was flatly contradictory, but as they chose to believe the plaintiff and her witnesses we shall not disturb their conclusions. We affirm the judgment, with costs.

MCCARTHY and O'DWYER, JJ., concur.

Judgment affirmed, with costs.

ERNEST WILLIAMS, Respondent, *v.* WILLIAM SEWARD WEBB, as President of the Wagner Palace Car Company, Appellant.

(City Court of New York, General Term, February, 1898.)

Common carriers — Money of a passenger not necessary for travel.

A common carrier is not liable to a sleeping-car passenger, from Detroit to New York, for the loss of $1,250, of which he had retained custody, and which he intended, upon subsequently reaching the city of Boston, to deposit in a bank, as such a large sum of money cannot be regarded as necessary or reasonable expenses of the trip.

APPEAL from a judgment in favor of plaintiff.

Saunders, Webb & Worcester, for appellant.

Thomas C. Campbell, for respondent.

FITZSIMONS, Ch. J. The judgment must be reversed and the complaint dismissed. The plaintiff's own testimony shows that at Detroit, he hired one of the defendant's sleeping berths to the city of New York, and thus became a passenger; that he had sufficient money in his purse to pay for his meals and other expenses that he might make coming down the road, and that, in addition, he had $1,250 in cash in a fob pocket in his pantaloons, the latter fund being the result of certain collections and the balance of a bank account collected a short time before, which fund he did not intend to use or meddle with, except to deposit it in a bank in Boston, when he got there.

This $1,250 he lost in the sleeping berth between Buffalo and New York, and he, claiming that such loss was due to the defendant's negligence, brought this action, and by the verdict of the jury recovered the amount.

I think that the rule of law, applicable to this case, is just, full and broad, and that there is nothing technical, harsh or arbitrary about it, and I think it may safely and briefly be stated to be, that a plaintiff can only recover, in actions of this character, such a reasonable sum as a man might properly and usually carry on his person for traveling expenses; the reasonableness of such sum, of course, depending upon surrounding circumstances, such as

his position and condition in life, his responsibility to others traveling under his care, distance traveled, etc.

In this case, the plaintiff had determined how much his expenses to this city should cost him, which he certainly had a right to do, that he was not stingy with himself was apparent, because he had at least $5 left of the fund, set apart for himself, after he had reached the city of New York.

It is, therefore, very apparent that the $1,250 was not necessary for his traveling expenses; that he never deemed it so; that he did not carry it with him on his person for any such purpose, and that the only reason why he did so carry it, was that he might deposit it in bank in Boston when he arrived there.

It appears that he desired to act as his own banker or safe deposit company, and in so doing he assumed all risk of that capacity, but cannot charge the defendant with damage caused by the loss in question, unless the responsibility of the custody of said fund was assumed by it, which is not claimed here.

For the reason that said $1,250 was not a necessary or reasonable part of plaintiff's traveling expenses from Detroit to the city of New York, the defendant's motion to dismiss the complaint should have been granted, and the judgment must be reversed and the complaint dismissed, with costs to the appellant.

O'DWYER and McCARTHY, JJ., concur.

Judgment reversed, and complaint dismissed, with costs to appellant.

GEORGE W. McGILL, Respondent, *v.* HOLMES, BOOTH & HAYDENS, Appellant.

(City Court of New York, General Term, February, 1898.)

Pleadings — An amendment changing the defense.

Where the answer admits the plaintiff's claim, and alleges an equitable set-off, which is disallowed, the defendant cannot, at a time when the trial has nearly closed, be allowed to amend its answer by denying the material allegations of the complaint and by alleging a very large legal counterclaim, as such an amendment would create new issues and would practically necessitate a trial de novo.

APPEAL from an order granted at Special Term.

Ward, Hayden & Satterlee, for appellant.

Atwater & Cruikshank, for respondent.

FITZSIMONS, Ch. J. The order appealed from must be affirmed. The issues framed by the complaint and amended answer, admitted plaintiff's claim.

The answer further attempted to allege an equitable set-off sufficient in amount to defeat the plaintiff's claim. Such set-off was properly disallowed by the referee, to whom the issues herein were sent for determination.

Now defendant seeks to amend its amended answer by alleging a counterclaim for nearly $12,000 and, in addition, denies the material allegations in the plaintiff's complaint.

It must be, therefore, apparent, that the proposed supplemental and amended answer actually proposed to make entirely new issues and entirely different from the issues framed by the complaint and by the amended answer.

The plaintiff's claim is denied in the last proposed answer. In the amended answer such claim was admitted, and, in addition, a very large counterclaim is alleged, something not attempted in the amended answer.

These very radical amendments, the defendant sought to have allowed to it just about the closing of the trial, before the referee.

The referee properly denied its application, likewise the Special Term justice when the matter was presented to him. If he had granted the motion, the trial would have rendered all the proceedings taken before the referee of no effect; the trial must have commenced again.

Plaintiff would have had cast upon his shoulders the burden of proving his case, and the defendant allowed to prove its counterclaim and disprove the plaintiff's claim.

Under these circumstances, we think that the order appealed from was properly made.

The defendant should not at this late hour be permitted to introduce its counterclaims but should sue upon the same in the usual way.

The order appealed from is affirmed, with costs.

CONLAN, J., concurs.

Order affirmed, with costs.

JACOB LEONARD et al., Respondents, *v.* MOSES R. CROW, Appellant.

(City Court of New York, General Term, February, 1898.)

1. **Bills and notes — Proof of execution.**

Where an answer admits the making of a note, the note is admissible in evidence and defects in the proof of its execution, are immaterial.

2. **Verdict.**

Where there is a conflict in the evidence, or when opposing inferences may be drawn from it, the verdict of the jury is conclusive.

APPEAL from a judgment in favor of plaintiffs entered upon a verdict and from an order denying a motion for a new trial.

Franklin Bien, for appellant.

C. H. & J. A. Young & Terry, for respondents.

CONLAN, J. This is an appeal from a judgment entered on the verdict of a jury, and from an order therein made denying a motion for a new trial.

The action is brought, as appears by the complaint, on a promissory note made by the defendant to the order of the plaintiffs for the sum of $1,036.48.

The answer admits the making of the note, but it denies that there was any consideration paid and then sets up as a defense that the same was an accommodation, and that the defendant never was indebted to the plaintiffs, but made the note upon representations made by the plaintiffs to him, which induced the giving of the note in suit.

The note in suit was one of a number of renewals given for the original note, which was the basis of the transaction between the parties. These renewals had been eighteen in all. During the progress of the trial a number of exceptions were taken in the defendant's behalf to the rulings of the court on the questions touching the admissibility of certain evidence, and it is upon these rulings chiefly that reliance seems to be placed for a reversal of the judgment.

We cannot think that counsel is serious in some of his con-

tentions; for instance, his objection to the introduction in evidence of the note in suit, in view of the statement of witness called to prove the signature of the defendant, namely: "I cannot be sure in regard to the note."

That was in answer to the question whether he ever saw the defendant sign it, when the making and delivery were expressly admitted by the answer, and the subsequent identification of the signature was positively made by the witness; and his insistence upon the right to examine the witness as to his expert knowledge of the handwriting, in view of the admissions already referred to, seems to us too trivial for serious consideration, and we are not in accord with the contention that this was sufficient for a reversal.

We do not find, in the case as made, any evidence in support of the defense alleged in the answer, namely that of accommodation.

The evidence adduced was upon the theory that the note was given under an order or assignment by a third party to whom the defendant was indebted.

It was claimed in his behalf that he did not owe this third party anything, but that there was an indebtedness in favor of said party to the New York & Westchester Water Company, and it was claimed that the original of the note was given upon an understanding that it was not to be paid unless this debt was collected from the water company, and that it had not been collected.

The evidence of Youngman, the plaintiffs' witness, who had the negotiations with the defendant for the making and delivery of the original note, upon this branch of the case, is, that when he called upon the defendant with the order of Mulligan & Co., who claimed that the defendant was indebted to them, the defendant said to him that he would investigate and see how much he owed them; and subsequently the note was given to cover so much of the debt as was found due from the defendant to Mulligan & Co., and as represented by the order for payment to the plaintiffs. This, of course, the defendant denies.

We have examined with great care the other exceptions taken by the defendant in the course of the trial, and are of the opinion that the objections of the defendant were properly disposed of by the trial justice, and that such disposition was not prejudicial to him. The case was submitted to the jury on all the evidence. There was a conflict, and we think his disposition of it was the correct one.

Our attention is not invited to the consideration of a single authority upon the appellant's brief which calls for an interference with the conclusions reached upon that submission. It has been well said in the case of People v. Sutherland, 154 N. Y. 345, "Where there is a conflict in the evidence, or where opposing inferences are to be drawn from the facts, it is the province of the jury to determine what the truth is, and the verdict under such circumstances is conclusive upon the court."

For these reasons we think the judgment should be affirmed. Judgment affirmed, with costs.

FITZSIMONS, Ch. J., and SCHUCHMAN, J., concur.

Judgment affirmed, with costs.

KATE CLOKEY, as Administratrix, etc., of JOHN T. CLOKEY, Respondent, *v.* THE INTERNATIONAL RUBBER CLOTHING & GENERAL SUPPLY CO., Appellant.

(City Court of New York, General Term, February, 1898.)

1. Pleadings — Amendment — Allegation as to the residence of a corporation.

Where the defendant denies the allegation of a complaint that it is a domestic and alleges itself to be a foreign corporation, a referee may at the close of the case, and although the defendant has given no evidence, properly permit the plaintiff to amend by alleging that the defendant is a foreign corporation.

2. Evidence — Proof a claim by a certificate in an action for an attachment.

Where an action is brought by an assignee of a claim, the court may, upon the disputed question of the amount due, consider a certificate, furnished in an action for an attachment, to the sheriff by the defendant, in which it denied any indebtedness to the attachment creditor and alleged that the exact amount, for which the plaintiff now claims, was due by it to a person named and who subsequently became the assignor of the plaintiff's estate.

APPEAL from a judgment in favor of plaintiff, entered upon the report of a referee.

William Stuart, for appellant.

Robinson, Biddle & Ward, for respondent.

CONLAN, J. This is an appeal from a judgment entered upon the report of a referee after the trial of the issues, in the action before him.

The action is to recover the sum of $549.97, upon an assigned claim for goods, wares and merchandise alleged by the plaintiff to have been sold to the defendant by one Thomas J. Little, and that the claim was assigned to one Howard W. White and by White to the plaintiff's intestate.

There was an allegation in the complaint that the defendant was a domestic corporation, which the answer denies, and pleaded itself as a New Jersey corporation.

The assignment and the exact amount due were put in issue also.

At the close of the plaintiff's case, the defendant's counsel moved to dismiss the complaint on the ground that the plaintiff had failed to prove that the defendant is a domestic corporation, and the referee sustained this view, with leave, however, to amend the complaint by alleging that the defendant was a foreign corporation, as the defendant had so pleaded in its answer.

The plaintiff availed herself of this offer, and the required amendment was inserted. To this permission the defendant objected and excepted, on the ground that it was too late.

We think that the amendment was a reasonable one, and properly allowed, and because of the allegation in the answer, its allowance was not prejudicial to the defendant. The defendant offered no evidence whatever and the referee, in his opinion, on this point, says: "The power of the court or referee to allow amendments would be very much curtailed if that power might be terminated the instant the plaintiff's case was finished by an announcement that the defendant also closed." The defendant was surely not prejudiced by the amendment. Especially is this so, because of the affirmative allegation in the answer, and we think the referee was right in his conclusion.

One other question requiring consideration is the one in dispute regarding the amount due to the original contractor, and in this particular, we are again relieved from uncertainty by the very act of the defendant, who, in its certificate furnished to the sheriff, who had attempted to levy upon a credit in favor of the original

creditor under an attachment issued against his property at the instance of a third party, expressly stated that it held and owed a certain sum of money, being the amount of the assigned claim to the assignee of the original claim, and that it owed no money to the assignor. The precise language of this certificate is important, namely: "We do not owe said party, Thomas J. Little, any money which we owe, being now owned by assignment, said Thomas J. Little having assigned to Howard W. White $549.97."

As we have already seen, White assigned this precise amount to the plaintiff's intestate, in whose name the action was originally brought.

This certificate is signed E. G. Milbury, president, and was upon a letter-head of the International Rubber Clothing & General Supply Company, the defendant in the case at bar.

The opinion of the referee is, as we think, in full accord with the views herein expressed, and we have been unable to find anything in the record which calls for any reversal of the judgment.

Judgment must, therefore, be affirmed, with costs.

FITZSIMONS, Ch. J., and SCHUCHMAN, J., concur.

Judgment affirmed, with costs.

PHILIP HOROWITZ et al., Respondents, *v.* SOLOMON L. PAKAS, Appellant.

(City Court of New York, General Term, February, 1898.)

1. Motion to dismiss the complaint.

An exception, to the denial of a motion to dismiss the complaint, is untenable, if the facts supplied by the evidence, given after the plaintiff rested, and after the motion to dismiss was made, sufficiently support the action.

2. Partnership — Notice of change — Parties.

Where a vendee gives vendors, with whom he has had prior business transactions, no notice, either directly or inferentially by a change in the form of his checks and business cards, that he has taken a partner, the vendee remains solely liable for goods sold, and cannot insist that his partner is a necessary party to an action for their price.

APPEAL from a judgment entered upon a verdict of a jury in favor of the plaintiffs and from an order denying a motion for a new trial.

David M. Neuberger, for appellant.

Max D. Steuer & A. Levy, for respondents.

O'DWYER, J. The action was brought to recover the agreed price of 560 lamps, alleged to have been delivered to the defendant on the 11th day of May, 1897.

The plaintiffs' witness Joseph Horowitz, testified: "I did on the 11th day of May, deliver 560 bicycle lamps. None of those lamps have ever been returned. The plaintiffs never received any of those lamps from the defendant. The agreed price of said lamps was $9 per dozen, less 10 per cent. For 560 lamps that would be $378. I have demanded payment of that sum. It was not paid.

"I spoke to Mr. Pakas after the delivery of these 560 lamps. I never spoke as to whether he received them or not. He said he received 560 lamps. I asked him for a check. He said he would send me a check. He sent me a check for $268. The check was returned to Mr. Pakas," and the defendant admits that he received the check returned.

The witness Horowitz testified: "We delivered them by the truckman. They were delivered — 560 lamps, with our boy. They were delivered with our errand boy with a truckman. They are not in court. We have the receipt for the goods."

The defendant testifies: "I gave him the order for 10,000 lamps. They were not delivered at all. I don't know how many we got; I believe about 1,000; maybe 2,000. We have had about three or four deliveries in all. I sent a check for $268; for the full amount, as I afterwards tried to dispose of those lamps sent."

A letter from the defendant, Exhibit B, is introduced in evidence, and is as follows:

"We have yours of yesterday's date, and beg to hand you check for $268 to settle our account with you. We have sufficient proof on hand that you sold to others at ten cents less than you did to us, and as we have your contract in hand, wherein you agreed to make good to us any such difference in price, that should result from your underselling the price you agreed to maintain in your agreement of the 22d inst., we have, therefore, in accordance with the

same, taken off the difference on your bills of the 26th ult. and 11th inst., as you have violated your agreement."

This letter is dated May 25th, and in it is inclosed a check for the bill of May 11th. The bill of May 11th is the bill that is sued for in this action.

The testimony tended to prove the delivery of the goods, and the defendant's motion to dismiss the complaint on that ground was properly denied.

An exception to the denial of the defendant's motion for a dismissal of the complaint is not available, if the facts supplied by the evidence, after the plaintiffs rested and the motion was made, are requisite to support the action.

On appeal, the court is to determine on the whole testimony, whether or not delivery is proved, and not simply on the testimony submitted before the motion to dismiss the complaint, and we are of the opinion that plaintiffs did, by a fair preponderance of evidence, prove a delivery of the goods in question.

The defendant's next defense was that the transaction was had with a partnership of which this defendant was one member, and that an individual known as Emanuel A. Brecher was also one of the firm, and, therefore, a necessary party. The transaction in question was had with the International Cycle Fittings Company of the city of New York.

The plaintiffs' witness testified: "I asked him if anybody else was in the business of the International Cycle Fittings Company. He said, 'No; I am Mr. Pakas, and I am the owner of the International Cycle Fittings Company.' And when I closed the sale with him for 10,000 lamps, I asked him, 'Who is the International Cycle Fittings Company?' And he said, 'My name is Pakas; I am the proprietor of the International Cycle Fittings Company.'"

The defendant testified that he had a conversation with Horowitz, and that Horowitz said: "If I (the defendant) give him a large order, that he will put me in a position where I can sell anybody lamps at just the same prices as they would sell it to themselves, but he wanted a large order — 10,000 lamps. I agreed to it, and he put the price down to seventy-five cents. I gave him the order for 10,000 lamps. I sent a check for $268. They said I could buy them at such and such prices. I could not sell them afterwards. * * * I know a corporation known as the Crown Electrical Manufacturing Company. I have an agreement with them at the present time. That agreement is in existence to-day, and that agreement describes me, Solomon L. Pakas, trading as

the International Cycle Fittings Company. I signed checks before the 15th of February the same as we do to-day. This is one of our checks issued the day before yesterday. I signed that 'International Cycle Fittings Company, Solomon L. Pakas.' * * * I have a business card. There is nothing on that card about Emanuel A. Brecher. Those were printed before that time, too. I have no cards with Emanuel A. Brecher on. I have no billheads. We are using the old ones as they come."

The evidence showed that the plaintiffs and the defendant had had some business dealings prior to the one of April 22d. The defendant nowhere testifies that he ever notified the plaintiffs that he changed his firm and took in a partner. They had a right to assume, therefore, that the firm remained as before; and as he never disclosed to them that there was a partner, he is liable to them individually, even though he did have a partner when this transaction of April 22d took place.

It is uncontradicted on the record that the plaintiffs had no knowledge that the defendant had any partner, or that he took any in, and the defendant himself testified that everything, before he became a partner, was just the same afterwards.

Upon this evidence the court charged much more favorably to the defendant than he was entitled. The court charged: "If you find that there was a partnership at the time this transaction took place, between the plaintiffs and the defendant, you will find for the defendant. If you find that there was no partnership, that the goods were sold and delivered to Pakas solely, your verdict will be for the plaintiffs."

This was an affirmative defense, and the burden of proof was on the defendant. The jury, after this instruction, found that there was no partnership, that the goods were sold solely to the defendant Pakas, and rendered a verdict for the plaintiffs, and we are of the opinion that the verdict is borne out by the evidence and should not be disturbed.

The defendant's third defense, that there was a breach of contract on the part of the plaintiffs, in that they sold the goods at a price lower than that which they had contracted to sell at, was unsupported by any evidence.

The exceptions taken during the trial do not show reversible error, and it follows that the judgment and order appealed from should be affirmed, with costs.

McCarthy, J., concurs.

Judgment and order affirmed, with costs.

EDWARD F. LEBER et al., Respondents, *v.* CHARLES HENRY DIETZ, Appellant.

(City Court of New York, General Term, February, 1898.)

Partnership — Partners cannot sue each other at law — Fraud.

A firm cannot maintain an action against one, who is a partner in its drug department, to recover damages which may result to the firm from the purchase by the defendant from a third party of a single consignment of orange peel for delivery to a customer, a company which subsequently denied the order; and as a partner has authority to purchase, an order for his arrest, based upon the ground of fraud and false and fraudulent representations, must be vacated.

APPEAL from an order denying a motion by the appellant to vacate an order of arrest granted herein.

David F. Toumey, for appellant.

Maurice J. Katz, for respondents.

O'DWYER, J. There was no complaint; and the affidavits must show ground for one of the statutory cases provided for in sections 549-550 of the Code of Civil Procedure, and the nature of the case made out must be stated in the order as the ground of the arrest.

The grounds of the arrest stated in the order are, "Fraud, false and fraudulent representations."

Fraud is a deception practiced in order to induce another to part with property or to surrender some legal right, and the affidavits found in this record do not make out a cause of action for fraud.

It does not appear that defendant, or anyone else through his acts, has obtained either money, goods or credit, and we are not satisfied from the proofs that the money, paid by the plaintiffs for the orange peel, will not be recovered when the merchandise is sold.

The other ground stated in the order of arrest — "false and fraudulent representations" — is not a cause of action in tort, known to the law.

Plaintiffs' exhibit "C" shows that the defendant did receive a verbal order from the Cheney Medicine Co., through Opitz, its manager, for gentian and gentian root, which was filled without comment; it also appears that the defendant was in Toledo and did have a consultation with Opitz concerning orange peel, and the case resolves itself into a contest of veracity between defendant and Opitz. That defendant wrote, "that he was in a hole," because Opitz denied the order, is true, but that language is not proof of fraud. Any one of the thousands engaged in selling goods can be placed in the same position at any moment by the buyer denying the order.

Furthermore, the agreement entered into between the plaintiffs and defendant conferred on defendant authority and discretion to order the orange peel, whether he had an order therefor or not.

The defendant is not a partner in the firm of Leber & Mayer, the plaintiffs, but his interest in the drug department under the agreement is such that they and he are copartners in that enterprise.

All the essential conditions for the creation of a copartnership are found therein. The agreement is between Edward F. Leber, Louis Mayer and the defendant, as individuals. It is executed by them individually under separate seals.

Plaintiffs agree "to furnish the capital"— the said department is to be charged interest — defendant is "to manage the purchases and sales." Defendant receives no salary — plaintiffs agree "to perform the financial duties of said department" and to "assist the defendant to the best of their ability." All three agree "to work the department between themselves in conformity with the ideas of each of them."

The department is charged with expenses, office rent, wages, etc. Annual accountings are to be had and the profits and losses ascertained. Net profits are to be divided, one-half to the plaintiffs and one-half to the defendant. Losses are to be borne in the same proportion, one-half by each. Defendant's accumulated profits are to remain in the business at interest. "In case the share of profits which may be credited to said defendant be not sufficient to cover the advances to be made to him, he shall be and remain responsible to the said Leber & Mayer for any such difference."

For aught that appears, the plaintiffs may have in their hands earned profits belonging to defendant more than sufficient to cover any loss that may arise from the purchase of the orange peel.

Plaintiffs have brought an action to recover damages, which are the possible losses that may be made upon one transaction in the business of the drug department. As the defendant had authority to make the purchase and the partnership exists, the action cannot be maintained.

It follows that the order appealed from should be reversed, with costs, and the motion to vacate the order of arrest granted, with $10 costs.

FITZSIMONS, Ch. J., concurs.

Order reversed, with costs, and motion granted, with $10 costs.

ROBERT P. STAATS et al., Respondents, *v.* FREDERICK M. HAUSLING, Appellant.

(City Court of New York, General Term, February, 1898.)

1. **Goods sold — Construction of contract — Evidence.**

Where the only issue, in an action brought to recover the purchase price of a shed upon a pier, is whether the vendee, in reselling to the vendors, at a price fixed and as junk, certain trusses of the shed, also included the timbers which were attached to the iron trusses and which the vendors took, it is erroneous for the court to preclude the vendor from showing the value of the iron as junk, as such proof would tend to show what materials were intended by the parties to be sold for the price fixed.

2. **Practice — Right to close.**

Where the allegations of the complaint are admitted by the answer and the defense rests upon a counterclaim, the defendant is entitled to make the closing argument to the jury, and a denial of the privilege affects a substantial right.

APPEAL from a judgment entered upon a verdict of a jury in favor of the plaintiffs and from an order denying a motion made by the defendant for a new trial.

Francis A. Dugro, for appellant.

Alfred E. Smith, Jr., for respondents.

O'DWYER, J. This action is on contract to recover the sum of $360, the balance of the purchase price of a shed on pier 43, North river.

Plaintiffs entered into an agreement with defendant by which they sold to him the shed on pier 43, North river, for $460, he to take the same down and remove it. There is no dispute over this agreement.

Subsequently, another agreement was entered into between the plaintiffs and the defendant, upon the subject-matter, over which the contentions of the parties herein were founded. The defendant asserted and maintained that the plaintiffs told him, after the agreement to purchase had been made, that they might be able to use the iron trusses, used on the shed, and asked him how much he would sell them for; that he told them he would sell them to the plaintiffs at the price of old iron, and that he did sell the same to them for the sum of $100. Defendant also insisted that the yellow pine timber attached to said iron was not covered by said sale. Plaintiffs claimed that the defendant not only sold the iron trusses, but the yellow pine timber attached thereto, for said sum of $100.

Plaintiffs took both iron and wood against the protest of the defendant. The defendant then charged plaintiffs $290.70 for the yellow pine timbers, being at the rate of $17 per thousand, in addition to the $100 for the iron trusses, and set up as a counterclaim to the plaintiffs' claim for the price of the shed, the value of the yellow pine timbers.

On the trial the defendant asserted that plaintiffs were entitled to recover of him the price of the shed, $460, less the value of the yellow pine timbers, and the agreed price of the iron trusses, which would leave a balance in favor of the plaintiff of $69.30.

The defendant having testified that, in making the agreement with the plaintiffs to resell to them the trusses, he told one of them, with whom he contracted, "that it is worth just old iron" and that they could have the trusses "at just the same price of junk iron," it was erroneous to refuse to allow him to show what that value was, after he had been shown qualified to give such evidence.

The only issue between the parties in this case was whether the defendant had sold to the plaintiffs the iron and the yellow pine timbers for $100, and if he had not sold the yellow pine timbers, the amount defendant was entitled to recover from plaintiffs at their value.

If the iron alone were intended, then the defendant was entitled to recover the reasonable value of the yellow pine timbers, as it was

admitted by the plaintiffs that they took the timbers with the iron.

The defendant should have been allowed to testify to the value of the iron, since the value as junk iron was expressed by defendant in the contract, was indicative of his intention and would have tended to show the intention of the plaintiffs as to what was to be included in the purchase.

The jury might have inferred that the iron was not worth $100, without the timbers, and, from that, that the wood was intended to be included.

The evidence related, therefore, to a fact in issue, and certainly to a fact relative to the issue, and was competent evidence of such fact; and to exclude it was error. The evidence of the witness Alfred Richards, as to the value of the yellow pine timbers was incompetent for the reason that he was not qualified to give evidence of their value.

The only facts by which it was attempted to show that the witness Richards had any knowledge of the market value of the timbers in question, was his statement that he was familiar in a way with the value and that since he worked for Mr. Staats he had sold timber.

This witness, without further qualification shown, was allowed, under the objection and exception of the defendant, to testify that, in his opinion, the yellow pine timber was not worth more than about $4 a thousand feet. This was less than the plaintiffs admitted it was worth.

John H. Staats, one of the plaintiffs, admitted and testified that, in his opinion, the timber was worth $5 per thousand. At this rate defendant would have received $85 for the timber.

Staats said too that he was very familiar with the market price and had bought and sold timber. The jury gave plaintiffs a verdict for two hundred and ninety dollars, exclusive of interest, which was seventy dollars less than the plaintiffs' claim, and as the claim in the complaint was admitted by the answer and upon the trial, and as the answer contained no denial of it, or set off against it, except the value of the timber set up in the counterclaim, the conclusion that the jury allowed the $70 for the 17,100 feet of timber or 17,000 feet, as plaintiffs admitted it to be, is unavoidable.

The court too instructed the jury that it was for them to decide whether the witness was a competent judge of the value.

Defendant should have been allowed to make the closing address to the jury.

Defendant's attorney made a motion at the close of the case to make the closing argument to the jury, which was denied. The whole of the plaintiffs' claim was admitted by the answer and upon the trial.

The only legal effect of the answer is that it admits that the agreement and transaction between the parties was that defendant purchased the shed in question from the plaintiffs for the sum of $460, and that he was indebted to plaintiffs for that amount, less any set-off; the answer did not take any issue whatever upon those facts.

The only fact denied in the answer is the right of the plaintiffs to take the timbers which the iron trussed up, and it set this up by way of counterclaim. When plaintiffs came into court they had nothing to prove.

If the plaintiffs had not offered any proof and the defendant had not offered any proof, the court would have been compelled, upon motion of the plaintiffs, to give them judgment for $460, less $100, or $360 demanded in the complaint.

The burden was upon the defendant, from the first instance, to prove that the plaintiffs had agreed to allow him more than plaintiffs admitted was due for the trusses. So the defendant necessarily had the affirmative, legally, from the commencement of the trial and this did not in any way shift; for plaintiffs' proof, all the way through the case, was simply to negative the defendant's claim, that they had taken the timber without right and he was damaged thereby.

The proofs offered by the respective parties during the trial showed this fact clearly, and when the defendant's counsel asked to have the closing argument to the jury, his request should have been granted, and the exception taken to the court's refusal shows error which affects a substantial right. Mead v. Shea, 92 N. Y. 122. The motion was made at the proper time. Mead v. Shea, *supra.*

The judgment and order appealed from should be reversed and a new trial ordered, with costs to the appellant to abide the event.

FITZSIMONS, Ch. J., and MCCARTHY, J., concur.

Judgment and order reversed and new trial ordered, with costs to appellant to abide event.

BRIDGET M. KELLY, Appellant, *v.* JOHN HENRY THEISS, Respondent.

(City Court of New York, General Term, February, 1898.)

A note executed by an alleged firm — Proof of partnership — Effect, upon a general denial, of allegations of a subsequent separate affirmative defense.

Where the proof made in an action upon a note tends to show that, although executed in the name of the firm, it was made by only one member thereof with whom the plaintiff dealt, her failure to prove the partnership, denied, under a general denial, by the defendant who did not execute the note, defeats the action, nor is her failure to make such proof of partnership excused because, in a subsequent separate defense, the same defendant alleged in substance that, at about the time alleged in the complaint, he gave the plaintiff a similar note executed in the firm name, and that this was not to be paid until he was able to pay it, as allegations, contained in a subsequent separate affirmative defense, are not available as admissions, nor can they affect the force of the general denial contained in the prior defense.

APPEAL from a judgment entered upon an order dismissing the plaintiff's complaint as against this defendant-respondent at the conclusion of a trial before the court and a jury.

A. J. Westermayr, for appellant.

Fromme Brothers, for respondent.

O'DWYER, J. This action was brought by the plaintiff against the respondent and others upon a complaint wherein it was alleged that:

"George Theiss" and "John Henry Theiss" (the respondent) were copartners in business under the firm name and style of "George Theiss & Brother," and that on the 23d day of June, 1896, the said George Theiss and John Henry Theiss made and executed a promissory note, a copy of which is set forth in the complaint and signed "George Theiss & Bro."

The respondent made answer denying these allegations *in toto*, and putting in issue the material allegations of the complaint.

The respondent, after these denials and for a separate and distinct answer and defense, alleged "that he did heretofore make a

promissory note signed G. Theiss & Brother" to the order of the plaintiff, dated at or about the time mentioned in said amended complaint, and for about the amount mentioned therein, but that it was then and there agreed by and between the plaintiff and this defendant that the same was to be formally executed as being payable on demand, but with the distinct understanding by and between this plaintiff and the defendant, that the same was payable only when this defendant was financially in condition, or able to pay, and that said defendant has not since the execution of said note, nor is he now, able to pay the same, and that, therefore, this action has been prematurely brought."

On the trial, the plaintiff testified that her dealings were with George Theiss, and no proof was introduced showing any dealings with the respondent, or that he was the copartner of George Theiss.

At the close of the case the complaint was dismissed as against the defendant, and from the judgment entered thereon, this plaintiff appeals.

The note in suit having confessedly been signed by George Theiss alone, John Henry Theiss not having been in any way connected with the note, and there being absolutely no proof that there was any copartnership between George Theiss and this respondent, although the complaint so alleged, the motion to dismiss the complaint was properly granted.

It is urged, however, by the appellant, that proof of the copartnership between George Theiss and the respondent was rendered unnecessary by the answer of the respondent, to-wit: the matter contained in the allegations setting up a separate and distinct answer and defense.

Under the system of pleading provided by the Code of Civil Procedure, a defendant is at liberty to set forth in his answer such defenses as he may have, whether inconsistent or not (Societa Italiana v. Sulzer, 138 N. Y. 472; Code Civ. Pro., § 507); and while the complaint may be aided, or proof upon the part of the plaintiff be dispensed with, through admissions or failure of denial in the answer, when a denial only is the purport of the defense, such is not the result where the allegations of the complaint are placed in issue by the answer and a separate defense is set up which proceeds upon the avoidance of liability, although upon the same state of facts.

The issue tendered by the complaint as to copartnership of "George Theiss and John Henry Theiss," and the making and delivery of the note in suit by that copartnership was accepted by

the answer, and the denial of the fact called upon the plaintiff to prove it, since it was essential to the cause of action.

The allegations of that fact by the defendant for the purposes of the separate defense did not affect the force of the denial as framing the issue (Brady v. Hutkoff, 13 Misc. Rep. 515; 34 N. Y. Supp. 947), and since the inconsistency between the different defenses did not invalidate the answer as to any particular one (Goodwin v. Wertheimer, 99 N. Y. 149; Ross v. Duffy, 12 N. Y. St. Repr. 584; Societa Italiana v. Sulzer, 138 N. Y. 472), the defendant was entitled to rely upon his general denial and abandon his separate defense, as far as proof of these particular facts are required. Balmford v. Grand Lodge, 19 Misc. Rep. 1; 42 N. Y. Supp. 881.

An answer may contain a direct or an implied admission of some fact alleged in the complaint. The admission is implied when the fact alleged in the complaint is not denied in the answer. It is direct when the admission is made in terms. Either form of admission of an allegation contained in the complaint is conclusive upon a defendant so long as it remains in the pleading and the plaintiff can point to it as conclusive proof of the truth of his allegation.

An allegation in the answer setting up an affirmative defense, which has no reference to and does not admit any allegation of the complaint, is of an entirely different nature. Such an allegation is not an admission, contained in a pleading, which is conclusive so long as it remains in the record. An admission which so concludes a party admits something alleged or set forth in the pleading to which the pleading containing the admission is answer. Ferris v. Hard, 135 N. Y. 354.

The answer in the case at bar denied the existence of a copartnership as alleged and of the making and the delivery by that copartnership of the note in suit.

The separate defense alleged attempted to describe a note made by the respondent, with a special agreement affecting its payment. This was not an admission of the allegations of the complaint; and as those allegations were denied and no proof offered in their support, the motion to dismiss the complaint was properly granted, and the order and judgment appealed from should be affirmed, with costs.

McCarthy and Schuchman, JJ., concur.

Judgment affirmed, with costs.

MORITZ KUGELMAN, Respondent, *v.* ROSA HIRSCHMAN et al., Appellants.

(City Court of New York, General Term, February, 1898.)

1. **Demurrer — Defect of parties defendant.**

A complaint is not made demurrable for a defect of parties defendant, unless it appears upon its face, that a person or persons have been omitted who should have been included.

2. **Same — Omission of directors, jointly and severally liable.**

Where the directors of a nursery and child's protectory are, by the Membership Corporations Law (Laws of 1895, chap. 559, § 11) made jointly and severally liable for its debts, a complaint for goods sold and services rendered to them, is not made demurrable because it merely states that the defendants sued "were directors" and does not state whether, during the period covered by the complaint, they did or did not constitute all the directors.

APPEAL from an order made at Special Term adjudging the demurrers interposed by the defendants to be frivolous, and directing judgment for the plaintiff thereon.

Samuel Greenbaum (Jacob H. Denenholz, of counsel), for appellants.

Gruber & Bonynge, for respondent.

O'DWYER, J. The action is brought to recover from the defendants, as directors of the Ladies Deborah Nursery & Child's Protectory, for goods sold and delivered, and for work, labor and services rendered to said corporation by the plaintiff.

The defendants demurred to the complaint on the ground that there is a defect of parties defendant, and that the complaint does not state facts sufficient to constitute a cause of action. The defect of parties defendant, if defect there be, as stated in the demurrer, does not appear on the face of the complaint, and, therefore, cannot be taken advantage of by demurrer.

The allegation in the complaint to which the demurrer is directed is that marked "Seventh," which reads as follows: "That the defendants, during all the times when the debts herein alleged were contracted, were directors of said Ladies Deborah Nursery & Child's Protectory.

The defendants demur, stating this ground for their demurrer: "That it appears upon the face of the complaint that there is a defect of parties defendant in the omission of all the other persons besides the defendant who were directors of the Ladies Deborah Nursery & Child's Protectory during the times mentioned in said complaint."

It is clear from mere inspection of the complaint that no such defect appears upon the face thereof.

The complaint simply states that the defendants "were directors" and does not state whether they were or were not all directors during said time.

A demurrer upon such ground is bad, unless it appears affirmatively in the complaint that some person or persons who should have been made defendants were omitted.

The court will take judicial notice of the statute (Laws of 1895, chap. 559, § 11) and, under it, the directors are jointly and severally liable and the plaintiff may sue one, any, or all. Strong v. Sproul, 4 Daly, 326; Halstead v. Dodge, 51 Supr. Ct. 169 at 170; Wilson Mfg. Co. v. Schwind, 5 Misc. Rep. 205; 25 N. Y. Supp. 808; State Bank v. Andrews, 18 N. Y. Supp. 167; Quigley v. Walter, 2 Sweeney, 175.

The complaint sets out all the facts necessary to constitute a cause of action under the statute.

It follows that the order appealed from should be affirmed, with costs.

McCarthy, J., concurs.

Order affirmed, with costs.

John S. Eldridge, Respondent, *v.* Sabina E. Husted, Appellant.

(City Court of New York, General Term, February, 1898.)

Principal and agent — Power of attorney to make notes.

Where a principal gives her agent a broad power of attorney to give negotiable paper in her name, she is liable upon a note which the attorney made in her name to himself as payee, and which he, so far as appeared, not for his own benefit, subsequently indorsed and delivered to the holder in consideration of his delivery of securities to the agent, upon which the latter received money.

APPEAL from a judgment, entered upon a verdict of the jury in favor of the plaintiff.

Henry L. Brant (Howard Y. Stillman, of counsel), for appellant.

Charles E. Hill, for respondent.

O'DWYER, J. The action was brought to recover upon two promissory notes made by the defendant, signed with her name and Peter V. Husted, her attorney in fact.

The complaint was an ordinary one upon promissory notes and alleges the notes, that Peter V. Husted was the attorney in fact of the defendant and authorized to make and deliver notes for the defendant; the making and delivery before and nonpayment at maturity.

The answer admits the power of attorney, the making and delivery and nonpayment, but alleges that it only authorized her attorney to make notes in her own business affairs and not in any manner to bind or charge the defendant for the personal debts or liabilities of said Peter V. Husted, and further, that the indebtedness, for which the notes were given, was that of Peter V. Husted and that no consideration was given to the defendant for such notes.

The complaint was sufficient to entitle plaintiff to judgment by default had no answer been interposed, and the motion made to dismiss the complaint, at the opening of the trial, on the ground that it did not state facts sufficient to constitute a cause of action, was properly denied.

On the trial, the plaintiff claimed that the consideration for the notes in question was the giving to Peter V. Husted, the only witness who appeared for the defendant, of certain securities which the plaintiff had, in consideration of the notes in question, on which securities Peter V. Husted received money; that these securities were given at the same time that the notes were given, and in consideration of such transfer of the securities.

The defendant contended that the notes were given in consideration of a past indebtedness and that there was no consideration given at the time that the notes were delivered to the plaintiff.

Upon this conflict the jury have found in favor of the plaintiff, and an examination of this record does not show that that verdict is against the weight of evidence or the preponderance of evidence. On the contrary we are satisfied that the verdict is fully justified by a fair preponderance of evidence.

At the conclusion of the trial the defendant requested the court to charge "that a trustee or agent should not act for his own benefit in any matter relating to his agency or trust;" and to a denial so to charge duly excepted.

There was nothing in the evidence, on either side, which would justify the claim that the note was made for the benefit of the agent. The case of Claflin v. Bank, 25 N. Y. 293, relied upon by the defendant, does not apply.

That case lays down the proposition only that the president of a bank is not entitled to certify his own check upon the bank and that a person taking such check runs the risk of the check not being good.

It nowhere holds that an agent with a broad power of attorney may not use his principal's name upon negotiable paper so as to bind the principal.

The fact that the note was made payable to himself and indorsed by himself does not invalidate the note; it simply gave the plaintiff the additional security of Peter V. Husted as indorser. Goshen Bank v. State, 141 N. Y. 379.

It was not error to exclude evidence of payment on account of the notes. There was no plea of payment, but on the other hand, the defendant in her answer denies making any payment on account of the notes.

The other exceptions require no discussion. The case was fairly tried and the judgment appealed from should be affirmed, with costs.

McCarthy and Schuchman, JJ., concur.

Judgment affirmed, with costs.

Daniel H. Moriarty, Respondent, *v.* Luther H. Porter et al., Appellants.

(City Court of New York, General Term, February, 1898.)

Torts — Lease of an unsafe bicycle.

Lessors who deliver to a lessee a bicycle, which is made of poor materials, and is in a condition unsafe for use, are liable, irrespective of the question of an express warranty, to the lessee for injuries which he sustained, by its sudden collapse, while being put to ordinary use by him, about three months after he had taken possession of it under a lease continuing for nine months.

APPEAL from a judgment, entered upon a verdict of a jury in favor of the plaintiff and against the defendants and from an order denying a motion for a new trial.

William A. Belcher, for appellants.

M. E. Harby (H. H. Kellogg, of counsel), for respondent.

O'DWYER, J. This action is brought to recover damages for injuries sustained by reason of the sudden collapse, while in ordinary use, of a bicycle leased by the defendants to the plaintiff.

The complaint, after setting forth the terms of the lease and compliance therewith on the part of the plaintiff, the collapse of the machine while in ordinary use, and the injury resulting therefrom, further alleged a warranty on the part of the defendants with respect to the quality of the bicycle; and the allegations of warranty were denied in the answer.

The sixth paragraph of the complaint, among other things, alleged that the bicycle "was not perfect in material and manufacture; that its frame was not of the best tubing; that its joints were not perfectly brazed and fitted, but that, on the contrary, the frame of the said machine was made of cheap, weak and faulty tubing; that the joints were wholly without reinforcement, and that the machine was not strong enough to bear the ordinary use for which such a machine is intended, but was a very dangerous machine to ride."

The answer contains no denial of these allegations, and on the trial no proof was offered with respect thereto and, upon this appeal, the record must be held to show that these allegations are admitted.

From the evidence it appears that, on the 31st day of May, 1895, the plaintiff leased a bicycle from the defendants for the term of nine months next thereafter, and that, on the 28th day of September, 1895, the bicycle, while it was being put to ordinary use by the plaintiff, suddenly collapsed and the plaintiff thereby received the injuries complained of. At the close of the case of plaintiff, a motion was made by the defendants to dismiss the complaint because of the lack of proof of a warranty, and to a denial of this motion the defendants excepted.

Upon this appeal, the defendants' counsel relies upon this alleged error as well as upon the fact that, when the case went to the jury, no evidence in support of a warranty had been offered

by the plaintiff, while, on the contrary, the defendants had introduced evidence denying any warranty on their part.

The court charged the jury:

"If you find in this case that the injuries, caused to the plaintiff, were caused by reason of faulty material or faulty construction of the bicycle in question, plaintiff will be entitled to a verdict."

It will thus be seen that the learned trial justice sent the case to the jury upon the question of the defendants' liability as lessors of the machine.

That responsibility was theirs, not because they warranted the machine, but because they failed in their duty as lessors to furnish to the lessee a bicycle that was a safe machine for the purpose for which it was hired. Glenn v. Winters, 17 Misc. Rep. 599.

The defendants cannot avoid their responsibility by attempting to throw it on the makers of the bicycle. It avails them nothing to show that they were merely agents since they allege that they were the lessors of the bicycle by virtue of a lease which they set out in full. Savings Bank v. Ward, 100 U. S. 195; Losee v. Clute, 51 N. Y. 494; Curtin v. Somerset, 140 Penn. St. 70.

The contract or lease was made with the defendants alone. They cannot go back of the lease and fasten the responsibility to this plaintiff on the manufacturer.

One of the primary duties of the lessor of a thing is, that he must deliver it to the lessee in a condition so that the lessee can enjoy its fruits, so that it can be safely put to the use for which it was intended, and the lessor is liable for any damage resulting within the time for which the thing was hired if the damage is owing to defects of the article leased.

It is true that the plaintiff alleged a warranty and offered no proof in support thereof, but in this we find no error. He had a right to rest solely upon the cause of action as otherwise stated in the complaint. By not denying the allegations contained in the sixth paragraph of the complaint, the defendants admit it to be true. Code Civ. Pro., §§ 500, 522.

Their responsibility is fixed and proof in support of the allegation of warranty becomes unnecessary and immaterial. Spring v. Bowne, 35 N. Y. Supp. 46.

The judgment and order appealed from should be affirmed, with costs.

McCarthy, J., concurs.

Judgment and order affirmed, with costs.

AUGUSTUS H. WHITING et al., Respondents, *v.* THORNDIKE SAUNDERS, Appellant.

(City Court of New York, General Term, February, 1898.)

1. **Brokers — Commissions.**

Where a person employs real estate brokers to dispose of real property he is liable to them, upon their performance, whether the title to the property is in his name, or in that of his wife.

2. **Same — A broker may, by consent, act for both sides.**

A real estate broker may, by consent, act for and receive commissions from both parties to an exchange of real properties.

APPEAL from a judgment, entered upon a verdict of a jury in favor of the plaintiffs and from an order denying a motion by the defendant for a new trial.

Saunders, Webb & Worcester, for appellant.

Samuel A. Noyes, for respondents.

O'DWYER, J. The action was brought by the plaintiffs, who are real estate brokers, to recover the sum of $300, and interest claimed by the plaintiffs to be due to them as a commission agreed upon for the sale, by exchange, of a house and lot at Long Branch, N. J., and seventy lots at Verona, N. J., for three flat or apartment-houses known as Nos. 195, 216 and 220 Fourth avenue in Brooklyn, N. Y.

The defendant's answer alleges that he employed the plaintiffs as the agent of his wife, Emma Saunders, and to act for her and not for himself, and that, during the progress of the negotiations, the plaintiff Richters made erroneous and incorrect statements to defendant in regard to the rents and taxes and mortgages on the three Brooklyn apartment-houses.

In September, 1894, the defendant Saunders met the plaintiff Richters and had an interview with him, and a day or two afterwards called at the office of the plaintiffs and gave them a memorandum of his property, consisting of a Long Branch cottage and lot and seventy lots at Verona, N. J., and employed them to dispose of these properties by sale or exchange. The plaintiff Richters entered said properties on the plaintiffs' books in the

name of Thorndike Saunders, as they knew no one else as the owner of the same.

Early in November, 1894, the plaintiff Richters informed the defendant that the plaintiffs had on their books three apartment-houses known as Nos. 195, 216 and 220 Fourth avenue in Brooklyn, that they represented and were acting for the owner, and would act as brokers for both parties in an exchange. Richters gave the defendant Saunders a description of the Fourth avenue properties and all the details, and he went over and examined the properties twice and agreed to make an exchange.

Before the contract of exchange was drawn up and signed, the defendant Saunders had an interview with both the plaintiffs Whiting and Richters at their office regarding their commissions on the exchange. The plaintiffs, after some conversation, agreed to reduce their commissions to the sum of $300, at which sum it was fixed and agreed on, and the defendant agreed to pay that sum ($300).

The contract was signed and executed on or about November 21, 1894, and at about this time the plaintiffs ascertained that the defendant's wife, Emma Saunders, owned the Long Branch and Verona properties, and that the defendant had a power of attorney.

The contract of exchange was carried out and completed, and the deeds were passed and exchanged on December 1, 1894, by the defendant and in his presence at the plaintiffs' office.

At the very inception of the negotiations and during their progress the defendant was fully informed that the plaintiffs had the Fourth avenue, Brooklyn, property on their books, and represented the owner of the same, and all the defendant's dealings with the plaintiffs were all along had with a full knowledge of, and reference to, such fact.

On or about December 4, 1894, the plaintiff Richters had an interview with the defendant and made a demand for the payment of the $300, being the plaintiffs' commissions as agreed upon, which was refused. The commission of $300, as agreed upon, has never been paid, and thereafter this action was brought to recover the same, with interest. The action was tried on May 27, 1897, and resulted in a verdict for the plaintiffs for the amount claimed and interest, the sum of $345.

By that verdict the jury have found that the plaintiffs were employed by the defendant individually, and not as the agent of

his wife, to dispose of the Long Branch and Verona properties by sale or exchange.

It matters not whether the title was in the name of Thorndike Saunders or Emma Saunders. If the defendant employed the plaintiffs to dispose of the properties he is liable.

The testimony and the facts disclosed in the case do not sustain the defendant's contention that the plaintiff Richters made false statements or representations regarding the rents, taxes or mortgages upon the Brooklyn apartment-houses. The defendant examined the Brooklyn apartment-houses himself, and so ascertained their condition, value and the amount of the rents and income, etc. This knowledge of the apartment-houses must be regarded as the basis of defendant's consent to make the exchange, and the finding of the jury must be regarded as conclusive in favor of the plaintiffs.

The fact that the plaintiffs represented both parties to the exchange of the properties and expected to receive a commission from both parties, with full notice to the defendant, and knowledge by him of such fact, does not constitute a defense to this action. Lansing v. Bliss, 86 Hun, 205, 206; Rowe v. Stevens, 53 N. Y. 621; Bonwell v. Auld, 7 Misc. Rep. 447; 27 N. Y. Supp. 936; 57 N. Y. St. Repr. 572.

"If a party employs a broker agreeing to pay him for his service, and has knowledge that he is also to be paid or expects to be paid by the other party, the agreement will be enforced." Lansing v. Bliss, 86 Hun, 209.

And this is so, whether or not the broker's services involve the exercise of discretion.

The jury have determined the conflict between the parties and we find that their verdict is supported by a fair preponderance of evidence.

None of the exceptions taken by the defendant require discussion.

The judgment and order appealed from should be affirmed, with costs.

McCarthy, J., concurs.

Judgment and order affirmed, with costs.

PETER MOLLOY, Respondent, *v.* ANNA J. LENNON, Appellant.

(City Court of New York, General Term, February, 1898.)

City Court of New York — Substituted service of the summons — Affidavits.

The provisions of the Code of Civil Procedure, § 436, relative to the substituted service of the summons, apply to the City Court of the city of New York, and where affidavits, submitted upon such an application, show that the defendant cannot, after diligent effort, be found at her alleged residence in that city, and that no information as to her whereabouts can be obtained, an order for substituted service is properly granted.

APPEAL from an order denying a motion made by the defendant to vacate and set aside an order for the substituted service of the summons herein on her.

James, Schell, Elkus & McGuire, for appellant.

W. J. Foster, for respondent.

O'DWYER, J. From the affidavits of the two process servers and the certificate of the sheriff it appears, that the defendant's residence is No. 73 West Seventy-first street in the city of New York, and that, after diligent effort to serve the summons herein by calling at said place of residence personally, service on the defendant could not be made and no information could be had as to her whereabouts.

We are of the opinion that the facts set forth in the affidavits entitled the plaintiff to the order for substituted service.

The order granted herein complies with the requirements of section 436 of the Code of Civil Procedure, and that section applies to the City Court of the city of New York.

The order appealed from should be affirmed, with costs.

MCCARTHY and SCHUCHMAN, JJ., concur.

Order affirmed, with costs.

HENRY C. MINER, Respondent, *v.* THE EDISON ELECTRIC ILLUMINATING COMPANY OF NEW YORK, Appellant.

(City Court of New York, General Term, February, 1898.)

1. **Corporations — Power of agents to contract.**

Where the by-laws of a corporation authorize its officers alone to make contracts for it, one of its agents has no power to bind it by a direction to a customer, for whom the corporation had nearly finished an electric switchboard to light his theatre, work upon which had been stopped at the instance of labor unions, that he might have the switchboard installed, at the expense of the corporation, by another company.

2. **Same — Extent of an agent's power — Ratification.**

A person dealing with an agent is bound to inquire as to the extent of his authority; and a principal cannot be held to have ratified the act of its agent unless it had full knowledge of the facts ratified.

3. **Appeal — Review of questions of law where there is a short decision.**

A case on appeal need not show affirmatively that it contains all the evidence in order to authorize the court to review a question of law; and an exception filed to a concise decision, made by a referee under the Code of Civil Procedure, § 1022, justifies a review of the facts contained in the record in order to determine the propriety of a ruling, denying a motion for a nonsuit made upon the ground that the evidence did not show a cause of action, as this raises only a question of law.

APPEAL from a judgment in favor of plaintiff, entered on the report of a referee, who was appointed to hear and determine the issues.

Eaton & Lewis, for appellant.

Howe & Hummel, for respondent.

SCHUCHMAN, J. The complaint herein alleges that during the month of November, 1892, at the special instance and request of the defendant and upon defendant's agreement to reimburse the plaintiff therefor, this said plaintiff paid, laid out and expended for and on behalf of said defendant the sum of $1,798.39.

The answer of the defendant denies this allegation and sets up a counterclaim of $1,270.53.

On the trial the plaintiff admitted the counterclaim and the referee found in favor of the plaintiff, and making allowance for the interest on the respective claims, ordered judgment in plaintiff's favor for the difference, to-wit, $596.69.

The evidence adduced by the plaintiff (he being the witness) shows: That the defendant, by its letter of January 12, 1892, signed by J. E. Sayles, General Agent, and addressed to the plaintiff, offered to furnish the latter an electric switchboard for the New Fifth Avenue Theatre, which offer was accepted by the plaintiff; that the arrangement, evidenced by said letter, was made by the plaintiff with the defendant, through but one man, Arthur Williams, defendant's representative; that plaintiff had numerous conversations with said Williams and with one Stephenson; that he, the plaintiff, had had several business transactions with the defendant and had always carried on all of them with Williams; that Williams introduced Stephenson to the plaintiff, saying: "This is our general superintendent, and he now takes hold of the matter; I withdraw and whatever he does is just exactly the same as if you were doing it with me. I (the plaintiff) asked Stephenson what was the matter, and he said the walking delegate had told him that if they went to work, he would call off the other men. I said to him, 'Well, what are you going to do about this? I have advertised to open the theatre, and I am under heavy expense and have everything ready, but without the switchboard, it is impossible for me to light my theatre.' He says: 'Well I will go down and see Mr. Bowker, and see what he can do.' Subsequently I received a letter from the Edison Company; it was dated May 12, 1892; and came, as near as I can remember, the very night after I had talked with Mr. Stephenson."

The letter of May 12, 1892, was addressed to the plaintiff and signed by R. R. Bowker, first vice-president of the defendant, and a part of it is as follows:

"We have delivered to you, as per our contract, a switchboard, on which we have put our best workmen and our best work — which is probably, in fact, the finest switchboard ever made for theatrical purposes and on which we have expended very much more money than we had directly or indirectly undertaken to do.

"We are ready to put that switchboard in place, or, to prevent inconvenience to you, we are ready to deliver it to you in its

present condition, and leave to you the responsibility of placing it. * * * We are not willing to resort to any subterfuge such as subletting, to get out of the jurisdiction of the walking delegate, as that means only a renewal of like difficulties for you and for others from time to time."

Thus appears the bone of contention and the crucial point in this case, namely: The defendant having furnished a switchboard, and all materials necessary thereto, and employees at its disposal to put in the switchboard, a walking delegate or union man threatened to call off all union mechanics of whatever trade working on the theatre, if the defendant was allowed to put in the switchboard.

The plaintiff was apprehensive that that threat might be executed and that he could not get the theatre ready for the opening day, previously fixed upon, an accomplishment which called for his utmost endeavor, inasmuch as he had everything arranged for the opening performance and was under heavy expense from that day onward.

The defendant contends that, in view of plaintiff's fear of difficulties with the labor union, it withdrew any objection, on its part, to the plaintiff's having the board finished by other people, provided it was done at the plaintiff's expense (defendant's exhibit 12, letter of August 3, 1892, signed by Bowker, and addressed to the plaintiff).

Plaintiff, however, contends that Stephenson on behalf of the defendant agreed with him, the plaintiff, to let the H. Ward Leonard Company finish the board, against whose work the walking delegate had no objection, and that the defendant would pay said company therefor; to which contention the defendant replies that Stephenson had no authority from the defendant corporation to make any such agreement, and that such agreement, even if made by Stephenson, was not binding upon it in law.

As to Williams, plaintiff testifies as follows:

"Mr. Williams negotiated this contract with me, and I had a number of interviews with him before it was signed, but I could not say how many.

"I have had a great deal of business with Mr. Williams. I did not know what position Mr. Williams held with the Edison Company at this time; I only knew that I did all my business with him. I never inquired of the officials of the defendant company as to his position, and I never consulted the by-laws or the minutes

of the defendant company as to his authority; I only knew that he represented to me the Edison Company, and I always done business with him, a great deal of business with the Edison Company."

As to Stephenson, the plaintiff testifies as follows:

"With regard to the authority of Mr. Stephenson, I only know what Mr. Williams told me; Mr. Williams told me that Stephenson was the general superintendent; he had full authority in connection with putting in the switchboard, and whatever he says is the same as if it was him. I do not remember ever seeing or meeting Mr. Stephenson in connection with any other matter, until I met him that morning. It was the morning that I was telephoned for to come up to the theatre, that the walking delegate had stopped the work on the switchboard — I think the morning of the 12th of May, 1892." And he further testified:

"I understood this letter of May 12 gave Mr. Stephenson authority to authorize me to employ outside contractors. I relied on Mr. Stephenson. Before Mr. Stephenson told me to employ the H. Ward Leonard Company, I had received that letter of May 12th."

And at folio 109, he testified as follows:

"When I saw Mr. Stephenson on the morning of the 14th, I certainly thought he had consulted with the officers of the defendant company; I don't think he said so; he simply told me to go ahead and make the contract."

This is substantially all the material evidence adduced by the plaintiff as his part of the case.

Under this state of facts the plaintiff rested his case, and the defendant moved for the dismissal of the complaint on three grounds:

First. That the plaintiff has failed to establish a cause of action.

Second. That the alleged contract between the plaintiff and the defendant had not been proved.

Third. That no authority on the part of any officer or agent of the defendant, the Illuminating Company, had been proved to make such a contract as has been alleged in the complaint.

Motion was denied and exception taken by defendant on each ground.

This was erroneous and the motion should have been granted. There is no evidence that Stephenson was the lawfully authorized agent of the corporation defendant to contract with the plaintiff to the effect that the plaintiff was to have the board finished by the

H. Ward Leonard Company, pay them therefor and be reimbursed by the defendant.

The rule of law is, that when a person deals with an agent, he must know that he deals with the power behind his agency, and it is then his duty, at his peril, to see to it, that the act done by the agent is legally authorized by the power.

A person, dealing with an agent, is bound to inquire into the extent of his authority, and ignorance of the agent's authority is no excuse. Leinkauf v. Lombard, Ayres & Co., 12 App. Div. 302; Nester v. Craig, 69 Hun, 543; Michael v. Eley, 61 id. 180; Hurley v. Watson, 68 Mich. 531.

There is no evidence that the corporation defendant ever ratified any such contract as the plaintiff alleged had been made by Stephenson, there is no evidence that the defendant had any knowledge of such a contract, and there can be no ratification of an act of an agent without full knowledge of the facts which it is claimed are ratified.

It seems that the plaintiff relied upon some implied authority possessed by Stephenson as a general superintendent, but the evidence does not show any such reliance.

To justify a party's reliance upon some implied authority of an agent to do a particular act, assumedly in behalf of his principal, the act must be practically indispensable to the execution of the duties delegated. Bickford v. Menier, 107 N. Y. 490.

The evidence adduced in behalf of the defense did not supply the above defect in the plaintiff's case, but on the contrary, it strengthened it.

Williams testified that he was never general superintendent of the defendant; that he was superintendent of its underground department, and at one time was general inspector; that he never made any contract, but negotiated quite a number; that he did not make any contracts with Mr. Miner, the plaintiff, but that he negotiated two or three contracts with Mr. Miner.

Stephenson testified that he was never general superintendent of the defendant; that he was superintendent of the installation department; that he never made any contracts, unless once in a while, perhaps a verbal contract, which was confirmed by order from the office, and that it was no part of his duty to make contracts for the company, and the by-laws of the defendant corporation (defendants' exhibit 15) show, that only the officers of the corporation were empowered to make contracts, and neither Stephenson nor Williams were such officers.

The respondent's point, that this court cannot consider the facts on this appeal, because there is no certificate that the case contains all the evidence given upon the trial, is not tenable.

Section 1022 of the Code provides that the court or referee, upon the trial of the whole issues of fact, may file a decision, stating concisely the grounds upon which the issues have been decided and direct the judgment to be entered thereon. In that case, the defeated party may file an exception to the decision, and then, on an appeal from the judgment entered thereon and upon a case containing exceptions, " the Appellate Division of the Supreme Court shall review all questions of fact and of law."

The referee's decision in the case at bar is of such a nature and in such a form.

The exception, taken to the denial of the motion for a nonsuit upon the ground that the evidence does not show a cause of action, raised a question of law.

This exception, appearing in the proposed case, serves as a notice to the respondent of an intention to raise the question of error in the ruling excepted to and puts upon him the responsibility of adding, by amendment, any needed proof.

As to rulings on questions of law, there is no need, therefore, that the case on appeal should affirmatively show that it contains all the evidence given upon the trial. Perkins v. Hill, 56 N. Y. 87; Porter v. Smith, 107 id. 531.

But as to rulings on questions of fact, exceptions are not permitted under the present Code, and hence there is nothing to notify or warn the successful party of his opponent's intention to ask the appellate court to review such finding, unless there is a statement in the case on appeal that it contains all the evidence; and in that case, such a statement is indispensable. Halpin v. Phenix Ins. Co., 118 N. Y. 165; Aldridge v. Aldridge, 120 id. 614.

Judgment appealed from reversed, order of reference discharged, and new trial granted, with costs to the appellant to abide the event.

CONLAN, J., concurs.

Judgment reversed, order of reference discharged and new trial granted, with costs to appellant to abide event.

EUGENE F. HEAGNEY, Appellant, *v.* LE ROY HOPKINS et al., Respondents.

(City Court of New York, General Term, February, 1898.)

Action by prior lienor upon a bond of contractors, discharging the lien — Appeal by the owner in an action by the contractors, where the prior lien was established — Construction of bond.

A common-law action may be maintained by a prior lienor against the sureties upon a bond given by contractors and conditioned to pay any judgment which the lienor may recover against the property, affected by the lien, upon a foreclosure of it; but where the owner of the property duly appeals from a judgment, rendered in an action brought against him by the contractors and, among other things, establishing the prior lienor's lien at a definite sum, the appeal makes premature an action brought by the lienor upon the bond while the appeal 's pending, as the judgment which the bond was intended to secure must be deemed to have been only a judgment which was absolutely final.

APPEAL from a judgment rendered by the court, dismissing the complaint of the plaintiff, on the merits.

Whitehead, Dexter & Osborn, for appellant.

J. Woolsey Shepard, for respondents.

SCHUCHMAN, J. The cause of action set forth in the complaint is a liability against sureties on a bond, given by contractors, the defendants, Hopkins and Roberts, to discharge a mechanic's lien.

The condition of the bond is as follows:

"If Hopkins and Roberts shall well and truly pay any and all judgments, which may be rendered against said property in favor of said Eugene F. Heagney, in an action to enforce his alleged lien, then the obligation shall be void, otherwise to remain in full force and virtue."

The complaint further alleges that on October 24, 1896, the defendants, Hopkins and Roberts, brought an action in the Supreme Court against William Engel, as owner, to foreclose a mechanic's lien against the property and made this plaintiff, Eugene F. Heagney, a prior lienor, a party defendant therein, and that on July

23, 1896, final judgment was rendered therein, adjudging and decreeing among other things, " that judgment be rendered against the property in favor of the plaintiff herein, and that the property be sold and that out of the proceeds arising from the sale, the plaintiff herein be paid the sum of four hundred dollars," (the amount due on his lien.)

The answer of the defendants (all answering in one answer) admits the giving of the bond, the bringing of said action, and the rendition of said judgment, but sets up for a separate and distinct answer, " that said William Engel took and perfected an appeal to the Appellate Division of the Supreme Court; and that, in and by his notice, he appealed from each and every part of the said judgment and that all proceedings under said judgment have been, and now are stayed by a compliance with the provisions of the Code of Civil Procedure, relating to appeals in mechanics' lien cases; that Engel has given the requisite undertaking and that said appeal is now pending and undisposed of."

On the trial, all the aforesaid allegations of the complaint and answer were proven without contradiction and it appeared furthermore that this plaintiff, Heagney, had interposed an answer in the said foreclosure action brought in the Supreme Court, and that the appeal from the judgment rendered therein was taken on August 19, 1896, and that this action was commenced on February 6, 1897.

The trial judge dismissed the plaintiff's complaint assigning as his reason therefor, that this action was a common-law action which could not be maintained against the sureties on such a bond, and that they could only be sued in an action in equity to foreclose the lien; citing Morton v. Tucker, 145 N. Y. 244, and see Reilly v. Poerschke, 19 Misc. Rep. 612.

In this reasoning, we think he erred and believe that this action, being a common-law action, is maintainable. Ringle v. Matthiessen, 10 App. Div. 274; Miller v. McKeon, 15 id. 133.

But the dismissal was proper and correct for another reason, viz.: That this action was prematurely brought.

It was brought on February 6, 1897, while the appeal, from the said judgment of foreclosure rendered in the Supreme Court, which was taken on August 19, 1896, was pending, and which is still undetermined.

The appeal of Engel, the owner, from that foreclosure judgment stays all proceedings thereunder. § 1331 of the Code of Civil Procedure.

By this judgment, the plaintiff's claim under the lien is established. If it is reversed on the appeal, then the plaintiff will have no judgment. How will he then fasten any liability on the sureties upon the bond in this action, which is conditioned on payment "of any and all judgments which may be rendered against said property in favor of said Eugene F. Heagney in an action to enforce his alleged lien."

The judgment, in this condition referred to, means a final judgment.

The trial judge dismissed the complaint upon the merits. The latter part is error. § 1209 of the Code; Place v. Hayward, 117 N. Y. 487; Bliven v. Robinson, 152 id. 333.

The judgment appealed from is modified by striking therefrom the words "upon the merits" and as thus modified, affirmed, without costs to either side on this appeal.

CONLAN, J., concurs.

Judgment modified and as modified, affirmed, without costs to either side upon this appeal.

HYMAN REISSMAN, an Infant, by BERNHARD REISSMAN, his Guardian ad Litem, Respondent, *v.* MORRIS JACOBOWITZ, Appellant.

(City Court of New York, General Term, February, 1898.)

Landlord and tenant — Negligence — A child injured by the fall of a ceiling.

A landlord, who has not agreed to repair, is not liable in damages to the child of a tenant for injuries received from the fall of a ceiling which, after the term had begun, became cracked and subsequently fell upon the child.

APPEAL from a judgment entered on the verdict of a jury and from an order denying a motion for a new trial, made on the judge's minutes.

Charles L. Cohn, for appellant.

Charles Steckler, for respondent.

SCHUCHMAN, J. The plaintiff, who was an infant of six years of age, was living with her father, who was a monthly tenant of

two rooms in the rear building of No. 248 Stanton street, in the city of New York.

After the said tenant had taken possession of the said two rooms, the ceiling of one of the rooms in which said infant was sleeping in his bed, became cracked, fell and injured the plaintiff.

The defendant's (the landlord's) liability in damages, as evidenced by the verdict, was predicated upon his failure to repair the ceiling within a reasonable period after its cracked condition was brought to his attention, at which time he had promised that repairs would be made.

The complaint alleges that the defendant was the owner of the premises No. 248 Stanton street; that the father of said infant was a monthly tenant occupying two rooms on the second floor of the rear building thereof, and that it was the duty of the defendant to keep and maintain the ceiling in the apartment in said rear building in good order and repair; that the defendant disregarded his said duty in the premises, and so carelessly and negligently conducted himself that he permitted and allowed the ceiling in said premises, so occupied by the plaintiff, to become and remain out of order and repair, and that, while the infant plaintiff was lawfully upon the premises, part of the ceiling fell and injured said plaintiff.

On the trial and upon its opening, the defendant's counsel moved to dismiss the complaint on the ground that it did not state facts sufficient to constitute a cause of action.

The motion was denied and the defendant duly excepted.

This was erroneous. The motion should have been granted.

The motion to dismiss the complaint in an action, on the ground that it does not state facts sufficient to constitute a cause of action, is available on the trial, and the granting of it upon that ground is not a matter of discretion, but of legal right. Tooker v. Arnoux, 76 N. Y. 397; Broome v. Taylor, id. 564; Montgomery Co. Bank v. Albany City Bank, 7 id. 459; Coffin v. Reynolds, 37 id. 640; Hand v. Shaw, 20 Misc. Rep. 698.

The owner or landlord of the premises is only liable in damages to a tenant, in either of the three following instances:

First. If he lets the premises and agrees to keep them in repair, but fails to do so, in consequence of which any one lawfully upon the premises suffers injury.

Second. If he demises premises, knowing that they are dangerous and unfit for the use for which they are hired, and fails to disclose their condition.

Third. If he creates a nuisance upon his premises, and then demises them, he remains liable for the consequence of the nuisance as the creator thereof.

But where the landlord has created no nuisance, is guilty of no willful wrong or fraud or culpable negligence and has made no express covenant to make repairs, then the law imposes no liability on him for any injury suffered by any person occupying the premises during the term of the demise.

No warranty is implied, on the part of a lessor of a dwelling, that it is safe and convenient. Cleves v. Willoughby, 7 Hill, 83; Franz v. Mulligan, 18 Misc. Rep. 411; Donner v. Ogilvie, 49 Hun, 229; Edwards v. N. Y. & H. R. R. Co., 98 N. Y. 245; Laird v. McGeorge, 16 Misc. Rep. 70; Doupe v. Genin, 45 N. Y. 119.

None of the above-mentioned three distinct cases, upon which a landlord's liability in damages depends, is set up in the complaint.

The complaint is, therefore, insufficient in law, it contains no cause of action and the motion to dismiss should have been granted. Miller v. Rinaldo, 21 Misc. Rep. 470; Schwartz v. Apple, id. 513.

This case does not belong to that class, relating to the nonrepairs of those portions of premises which the landlord keeps within his own control, and which are used as a means of egress and exit to apartments, separately demised to tenants, in which class the courts have held that the landlord's liability is founded upon the duty which arises from his invitation to his tenants to use the passage-ways and the consequent right, of those invited, to rely upon their reasonably safe condition. Peil v. Reinhart, 127 N. Y. 381.

It is true that an amendment of the complaint might have been allowed by the trial court, but none was asked for or made, and the objection to the complaint having been taken in due season, the correctness of the ruling must be tested by the complaint as it stood. Tooker v. Arnoux, *supra*.

The judgment is reversed and a new trial granted, with costs to the appellant to abide the event.

CONLAN, J., concurs.

Judgment reversed and new trial ordered, with costs to appellant to abide event.

SARAH KAMERMANN, by her Guardian ad Litem, BECKY KAMERMANN, Respondent, *v.* THE EISNER & MENDELSON CO., Appellant.

(City Court of New York, General Term, February, 1898.)

Security for costs from one authorized by statute to sue — Notice of such a motion.

Where an application is made, under the Code of Civil Procedure, § 3271, to compel a person expressly authorized by statute to sue, e. g., an infant, to give security for costs, the motion must be made to the court, on notice, and an order made *ex parte* is irregular.

APPEAL by the defendant from an order vacating an order directing the plaintiff to file security for costs.

F. V. Johnson, for appellant.

Langbein Bros. & Langbein, for respondent.

SCHUCHMAN, J. The order directing the plaintiff to file security for costs was made *ex parte*. This was irregular. The irregularity is specified in subdivision 6 of the moving papers. The order was, therefore, properly vacated. Under section 3268 of the Code, the defendant as an absolute right, may require the plaintiff to file security for costs, and under section 3272 the court must, in that case, make the order and can make it *ex parte*. When, however, the application is made under section 3271 which reads:

"In an action brought by * * * a person expressly authorized by statute to sue * * * the court may, in its discretion, require the plaintiff to give security for costs * * *" then it must be made, on notice of motion, to the court. The plaintiff herein is a person expressly authorized by statute to sue (section 468), and this case falls, therefore, within section 3271. Wood v. Blodgett, 49 Hun, 64; Swift v. Wheeler, 46 id. 580; Healy v. Twenty-third St. R. R. Co., 1 Civ. Pro. 15; Ryan v. Potter, 4 id. 80.

Order appealed from affirmed, with $10 costs and disbursements.

O'DWYER, J., concurs.

Order affirmed, with $10 costs and disbursements.

ANTHONY SAFFER, Respondent, *v.* THE WESTCHESTER ELECTRIC RAILWAY CO., Appellant.

(City Court of New York, General Term, February, 1898.)

Negligence — Collision on an electric-car track — Negligence of motorman.

Proof, made in an action based upon negligence, tending to show that an electric car of the defendant was 300 feet distant when the plaintiff's truck became fixed in a hole in the bed of the defendant's track and that, although the plaintiff yelled repeatedly to the motorman to stop his car, he ran into the truck upon a clear night, and when an electric light was within fifty feet of the place of the accident, sufficiently indicates that the defendant was guilty of negligence.

APPEAL by the defendant from a judgment entered upon the verdict of a jury, and from an order denying its motion for a new trial, made on the judge's minutes.

Hoadly, Lauterbach & Johnson, for appellant.

Welch & Daniels, for respondent.

SCHUCHMAN, J. This action was brought to recover damages alleged to have been sustained by the plaintiff through the defendant's negligence in running a trolley car into a horse and truck that plaintiff owned and was driving.

The plaintiff in presenting his side of the case proved: That on December 19, 1895, at about 6:30 o'clock, p. m., he drove his horse and truck loaded with marble northwardly along a road, called Boston or Bear Swamp road, on the right side of which defendant operated a trolley line of cars.

Plaintiff found the road very soft and loamy so that the horse could not pull through; he, therefore, drove on to the hard trolley roadbed; he got stuck on that in a hole and seeing a trolley car coming towards him, southwardly, he was endeavoring to turn and get off the track, but being stuck he could not succeed. He then yelled to the motorman, in charge of the car, repeatedly, a dozen times, "stop the car."

The car was about 300 feet away when the plaintiff first saw it; it was run at the rate of twelve to twenty miles an hour. It

was a clear night, not foggy and an electric street light was within fifty feet of the accident. The motorman made no attempt to stop the car until it struck plaintiff's horse and truck, injuring the horse so much that it had to be killed, overthrowing the truck, and throwing the plaintiff off the wagon, so that he became unconscious and had to keep in bed for four weeks, in order to heal his bruises and the injuries occasioned.

This evidence is sufficient to charge the defendant's motorman with want of exercise of care and caution of an ordinarily prudent man, in running the car against plaintiff's horse and wagon under the circumstances in this case. The evidence fully absolves plaintiff of contributory negligence.

To be sure, all the evidence presented on plaintiff's behalf is contradicted by the defendant's side of the case; but that conflict is settled by the jury rendering a verdict for the plaintiff in the sum of $500.

The plaintiff proved the value of the horse at $250, the truck, at $100, the harness, at $50, the medical services and medicines, at $119, and the loss of his services at $25 a week, or, for the four weeks during which he was laid up, $100, making a total of $619; a sum in excess of the $500 verdict rendered. For that reason, the evidence, admitted by the trial judge and complained of in the appellant's fourth point, to the effect "that for about nine months after the accident occurred plaintiff was unable to work," etc., did not act injuriously upon the minds of the jury in fixing the amount of their verdict to defendant's prejudice.

The loss of time and services occasioned to plaintiff by the injury was properly pleaded. Section 3 of bill of particulars and complaint.

None of the various exceptions present reversible error, and, therefore, the judgment and order appealed from are affirmed, with costs.

O'Dwyer, J., concurs.

Judgment and order affirmed, with costs.

FREDERICK T. MASON, Appellant, *v.* FREDERICK TIETIG, Respondent.

(City Court of New York, General Term, February, 1898.)

Practice — Case on appeal — Resettlement.

The Special Term of the City Court of the city of New York may direct a trial justice to resettle a case on appeal, if he deems it proper to do so, but it cannot direct him to resettle it in a manner specified in the order of resettlement.

APPEAL from an order resettling a case on appeal.

C. H. & J. A. Young & Terry, for appellant.

James S. Lehmaier, for respondent.

Per Curiam. The order appealed from must be modified. It directs the trial justice to resettle the case on appeal in a particular manner. In so doing the Special Term justice exceeded his powers.

If it appeared to him that the case on appeal was not properly settled, it was within his power to order that it be sent back to the trial justice to resettle the same, if he deemed it proper to do so.

The order appealed from goes further than that, and directs a resettlement in certain particulars. It must be modified so as to conform to our view and as so modified, is affirmed, without costs.

Present: FITZSIMONS, Ch. J., and CONLAN, J.

Order modified and as modified, affirmed, without costs.

ALBERT KRAETZER, Respondent, *v.* EMIL THOMAS et al., Appellants.

(City Court of New York, General Term, February, 1898.)

Verdict — Failure to except.

Where the evidence, given upon the trial of an action, is conflicting and no exceptions are taken by the defendants, except to a refusal of the court to dismiss the complaint, a verdict for the plaintiff must stand.

APPEAL from a judgment in favor of plaintiff, entered upon a verdict and from an order denying a motion for a new trial.

John L. Branch, for appellants.

Parker & Aaron, for respondent.

Per Curiam. Appeal from a judgment, entered on the verdict of a jury, and from an order denying a motion for a new trial.

The plaintiff was a designer and manufacturer of children's reefers, and the defendants were manufacturers and dealers therein.

An agreement was entered into in writing between the parties for the services of the plaintiff at a fixed compensation, which he alleges was afterwards terminated by a further agreement to pay him compensation at the rate of $40 per week for fourteen weeks, and a further sum of $287.77 alleged to be due him under the agreement first named, as a settlement upon the termination thereof.

The first agreement is admitted by the defendants, but the subsequent arrangements for its termination, as well as the balance claimed to be due, were denied.

The whole case went to the jury upon disputed questions of fact, and there was no exception to the charge of the trial judge, nor do we find a single exception in the record taken by the defendants, during the progress of the trial, except to the refusal of the court to dismiss the complaint on the defendants' motion, at the close of the plaintiff's case, and the record as made does not appear to present to this court any single exception for review on appeal.

The whole case was fairly presented to the jury, upon all the evidence, and there was a determination in the plaintiff's favor for the full amount claimed. We think the judgment should be affirmed. Judgment affirmed, with costs.

Present: FITZSIMONS, Ch. J., and MCCARTHY, J.

Judgment affirmed, with costs.

THE WEEHAWKEN WHARF CO., Respondent, *v.* THE KNICKERBOCKER COAL CO., Appellant.

(City Court of New York, General Term, February, 1898.)

Attachment — Irregularities should be specified in an order to show cause why an attachment should not be vacated.

Semble that an order requiring the plaintiff to show cause why an attachment which it has obtained, should not be vacated, must specify the irregularities of which the defendant complains.

APPEAL from an order vacating an attachment.

Edwards & Bryan, for appellant.

James R. Rogers, for respondent.

Per Curiam. The irregularities complained of should have been specified in the order to show cause why the attachment granted herein should not be vacated. This the appellant failed to do and we think there is nothing for us to review upon this appeal. Rule 27, General Rules of Practice.

If, however, said rule does not apply to this instance, as appellant contends, then we have to say that a careful perusal of the papers upon which the said warrant was obtained, convinces us that they contained more than sufficient facts to justify the issuance of said warrant.

The order appealed from is affirmed, with costs.

Present: FITZSIMONS, Ch. J., and MCCARTHY, J.

Order affirmed, with costs.

JOSEPH W. BAKER, Plaintiff, *v.* LORENZO O. BUCKLIN, Individually and as County Treasurer of Herkimer County, Defendant.

(Supreme Court, Herkimer Special Term, February, 1898.)

Liquor Tax Law — Payment, for a certificate, not recoverable — Population of a village not shown by the census.

Where it is conceded that the population of a village is at least 4,000, a holder of a liquor tax certificate, voluntarily paid for upon that basis, cannot, merely because the population of the village is not stated, separately from that of its town, in either the last state or United States census, subsequently recover of the county treasurer the difference between that rate and the rate fixed for a village whose population is under 1,200; and the fact that the state commissioner of excise has not caused any enumeration of the village to be made under the statute (Laws of 1896, chap. 112, § 11, subd. 4), is immaterial.

ACTION brought to recover amount claimed to have been paid by the plaintiff for a liquor tax certificate, in excess of the amount required by law.

William J. Gardinier, for plaintiff.

E. E. Sheldon, for defendant.

MCLENNAN, J. On or about the 1st day of May, 1896, one John T. Kerrivan, who was then county treasurer of Herkimer county, upon proper application to him made, issued to the plaintiff liquor tax certificate No. 25,103, in and for the village of Herkimer, and received from the plaintiff the sum of $200 in payment therefor.

Within ten days thereafter said Kerrivan, as such county treasurer, turned over the moneys so received from the plaintiff to the state of New York and to the village of Herkimer, as required by law.

On the 1st day of January, 1897, the defendant Lorenzo O. Bucklin became county treasurer of Herkimer county, having succeeded said John T. Kerrivan, and ever since has been and now is such treasurer, and as such received from his predecessor all moneys, books and papers in his predecessor's hands. None of the moneys, however, which were received from the plaintiff were

turned over to the defendant, but the defendant has had in his hands, at various times, moneys received for issuing liquor tax certificates, amounting in the aggregate to a sum largely in excess of plaintiff's claim.

Before the commencement of this action the plaintiff duly demanded of the defendant $100, the excess claimed to have been paid for the liquor tax certificates issued to him as aforesaid.

Section 11, subdivision 1 of the Liquor Tax Law is as follows:

"Excise taxes upon the business of trafficking in liquors shall be of four grades and assessed as follows:

"Subdivision 1. Upon the business of trafficking in liquors to be drunk upon the premises where sold, or which are so drunk, whether in a hotel, restaurant, saloon, store, shop, booth or other place, or in any outbuilding, yard or garden appertaining thereto or connected therewith, there is assessed an excise tax to be paid by every corporation, association, copartnership or person, engaged in such traffic, and for each such place where such traffic is carried on by such corporation, association, copartnership or person, if the same be in a city having by the last state census a population of fifteen hundred thousand or more, the sum of eight hundred dollars; * * * if in a village having by said census a population of less than five thousand but more than twelve hundred, the sum of two hundred dollars; if in any other place the sum of one hundred dollars." * * *

By the last paragraph of subdivision 4 of said act it is provided:

"When the population of a city or village is not shown by the last state census, it shall be determined for the purposes of this act by the last United States census, and if not so shown by reason of the incorporation of a new city or village, the state commissioner of excise is authorized and directed to cause an enumeration of the inhabitants to be taken in such city or village." * * *

It appears by the evidence in this case that the population of the village of Herkimer was not separately returned and stated by the last state census or by the last United States census referred to in the above act, but the village of Herkimer was reported and stated in each census as a part of the town of Herkimer, and it appears that there was no separate enumeration of the inhabitants of the village, but the enumeration in each case was of the entire town of Herkimer. So that there is no statement in either census which shows the population of the village of Herkimer separately.

The population of the entire town of Herkimer is shown by the last state census to be 5,150, and consequently, if the population of the village was not at least 1,200, the population of the town would be at least 3,950.

We think that the court may take judicial notice of the fact that the population of the town of Herkimer, outside of the village of Herkimer, at the time of the taking of the last state census, was not 3,950, and, therefore, that the population of the village of Herkimer at that time, as shown by the last state census, was in excess of 1,200.

It was conceded upon the trial that, at the time the liquor tax certificate was applied for by the plaintiff and issued to him by the then county treasurer, the actual population of the village of Herkimer was at least 4,000, and such a number as to entitle the county treasurer to demand the sum of $200 from the plaintiff, the amount which he received. At the time the money was paid to the then county treasurer by the plaintiff, no question was raised as to the population of the village of Herkimer, and no question was made as to the amount of tax which should be paid by the plaintiff, but it may be held, notwithstanding that fact, that such payment by the plaintiff was not voluntary, it having been demanded of him and paid by him pursuant to statute.

It is urged on behalf of the plaintiff that, because the population of the village of Herkimer is not separately stated in the last state census, nor in the last United States census, and because it does not appear, by separate statement, that the population of the village of Herkimer was more than 1,200 at the time the certificate in question was issued to the plaintiff, the county treasurer should only have demanded and received for the certificate in question the sum of $100, notwithstanding the population of the village was actually 4,000, and largely in excess of the number required to entitle such county treasurer to demand and receive the sum of $200 for such certificate.

In effect, the plaintiff concedes that he paid the exact amount which he should have paid for the right to engage in the liquor business in a village having a population of the village of Herkimer, but insists that, because such population was not shown by a separate statement in either census referred to, he should pay upon the basis that the population was less than 1,200, although conceding that it was in fact 4,000. It is not believed that such is the proper construction of the statute in question. It is specifi-

cally provided by the act referred to that in villages having a population of more than 1,200, $200 must be paid for a liquor tax certificate which will entitle a person to engage in the liquor business in such village.

As a ready means of ascertaining the population of a municipality where it is close or in dispute, it is provided by said act that recourse may be had to the last state or United States census. It does not follow that where the population of a village is well known, and is conceded to be largely in excess of the number which would require the payment of $200 for a liquor tax certificate, that a less sum should be paid because such population is not separately stated in the census referred to. Such a construction of the statute would be unreasonable and unjust, and would permit unjust discrimination as between villages, and there is no method, provided by the statute, by which such an unjust discrimination could be avoided, in case the contention of the plaintiff should prevail.

The last paragraph of subdivision 4 of the act only provides for a new enumeration of the inhabitants of a village where the population is not shown, by the last state census nor by the last United States census, "by reason of the incorporation of a new city or village;" in that case the state commissioner of excise is authorized and directed to cause an enumeration of the inhabitants to be taken in such city or village.

So that, in the case at bar, if the contention of the plaintiff is to prevail, notwithstanding the population of the village of Herkimer is conceded to have been 4,000 at the time in question, notwithstanding the fact that the court must take judicial notice of such population, and notwithstanding the further fact that, from the last state census, it may clearly be ascertained that the population of the village of Herkimer was in excess of 1,200, applicants for liquor tax certificates in said village can only be required to pay upon the basis and upon the assumption that the population of said village was less than 1,200.

As before said, it is believed that such construction would be unreasonable and unjust. The plaintiff paid for the certificate issued to him exactly what he should have paid. He paid the amount, knowing what the population of the village was, or at least knowing that it was largely in excess of 1,200, and he is not entitled to recover back any part of the sum so paid simply because the population of said village is not separately stated in the last state census, nor in the last United States census.

It is unnecessary to consider any of the other questions raised by defendant's counsel. The plaintiff's complaint should be dismissed, with costs. Judgment is ordered accordingly.

Ordered accordingly.

CLARA BLAUVELT, Plaintiff, *v.* ELIZABETH GALLAGHER et al., Defendants.

(Supreme Court, Kings Special Term, February 1898.)

Mortgages — Validity of mortgages, given by a life tenant, who had a right to use the principal of an estate.

A bequest, by which a testator leaves his entire estate to his wife "for the support of herself and my children while she lives and remains unmarried, and at her death to leave the residue to my (his) children as she deems proper", gives her, during her widowhood, a life estate with power to use the principal, and hence mortgages, given by her during that period, are a valid lien upon the real estate of the testator.

MOTION to compel a purchaser to take title under foreclosure sale. The mortgage was made by Elizabeth Gallagher, widow of Charles Gallagher, deceased. By his will he left his entire estate to his wife "for the support of her and my children while she lives and remains unmarried, and at her death to leave the residue to my children as she deems proper."

Alfred R. Page, for motion.

Parsons, Shepard & Ogden, opposed.

GAYNOR J.: The wife is given the entire estate while she "lives and remains unmarried", to support herself and the children, and at her death to leave the "residue" to the children. She is not given the fee; but this direction as to the residue makes clear her power to consume the principal. The meaning therefore is that the estate is given to her for life, with power to consume the principal, but such estate and power to cease upon her remarrying. Meanwhile, however, the power to consume continues, and under it she may mortgage or sell (Swarthout v. Ranier, 143 N. Y. 499; Rose v. Hatch, 125 N. Y. 428). This mortgage having been made by her during widowhood, it therefore covered the fee.

Motion granted.

FERDINAND BOHMER, JR., Plaintiff, *v.* LOUIS F. HAFFEN, Commissioner of Street Improvements of Twenty-third and Twenty-fourth Wards of the city of New York, et al., Defendants.

(Supreme Court, New York Special Term, February, 1898.)

1. **Constitutional Law — Subject not mentioned in the title of an act.**
   Chapter 361 of the Laws of 1863, relative to the corporation of the Union Railway Company of New York city, is not rendered unconstitutional by the fact that a single section, which is independent of all others and which provides for the extension of the road, contains a subject which is not mentioned in the title of the act.
2. **Same — Consolidation of railroads — Creation of a new railroad and by a new name.**
   An act (Laws of 1892, chap. 340) is not rendered unconstitutional because it authorizes the consolidation of two or more railroads nor because it dissolves the original corporation and creates a new one with a new name.
3. **Same — Waiver of forfeitures, in failing to complete a railroad in time.**
   The state may, by subsequent legislation, waive forfeitures, which would otherwise have resulted from the failure of a railroad corporation to complete its road within the time fixed by law.

ACTION to declare illegal, permits granted by Louis F. Haffen, commissioner of street improvements of the Twenty-third and Twenty-fourth wards, in the city of New York, to the Union Railway Company.

James A. Deering, for plaintiff.

Sheehan & Collin, for Union Railway Co., defendant.

John Whalen, Corporation Counsel, for Haffen and city.

TRUAX, J. It is claimed by the plaintiff that chapter 361 of the Laws of 1863 is unconstitutional, because it embraces more than a single subject. The only portion of this act that relates to a subject not mentioned in its title is section 9, and this section may be declared to be unconstitutional without affecting the legality of the other portions of the act, or the existence of the defendant, the

Union Railway Company. Section 9 is entirely independent of the other sections, and provides for an extension of the road, the building of which is authorized by the other sections, and may easily be separated from such sections. Without this section the act is complete in itself and constitutional. 148 N. Y. 540. Moreover, an act which has stood as long as this act has stood should be declared unconstitutional by a trial court only when the question is without doubt. The act of 1892 (chap. 340, Laws of 1892), is not unconstitutional. The amendments provided for in this act were amendments within the reasonable scope of the subject named in the title of the original act. They were fairly and reasonably connected with the subject of the original act, and, therefore, may properly be incorporated in the act and are germane to its title. Wilcox v. Baker, 22 App. Div. 299; People ex rel. City of Rochester v. Briggs, 50 N. Y. 553. Nor is it unconstitutional because it creates a railroad by a special instead of a general law. It does not "create" a railroad, it simply authorizes the consolidation of two or more railroads, and such an act has been held to be constitutional. Sandham v. Nye, 9 Misc. Rep. 541, and cases there cited. The powers and rights of the roads consolidated are defined by the acts creating them. The fact (if it be the fact) that the said defendant is constructing a railroad which its charter does not authorize it to construct furnishes no reason for declaring the act creating it unconstitutional. Nor does the fact that the act of 1892 dissolved the original company and created a new corporation with a new name, render that act unconstitutional. The very thing was done by the act which was declared constitutional in Sandham v. Nye, *supra*. It is claimed by the plaintiff that the charter of the original company lapsed because the road was not completed within ten years as required by section 47 of the General Railroad Law. Chap. 140, Laws of 1850. Section 4 of chapter 361 of the Laws of 1863 (the act creating the original company) provides that a certain portion of the railroad shall be completed in six months, and a certain other portion in twelve months from the passage of the act. It also provides that "if the said corporation is delayed in commencing or completing the said railroad by any other cause than its own act, the time during which such delays continue shall not be included in such period." The evidence shows that that portion of the said railroad mentioned in the first eight sections of the act of 1863 was completed within the time mentioned in that act, and, therefore, section 47 of the general act, even if it

does apply to that portion of the railroad mentioned in the ninth section of the act of 1863, does not apply to those completed portions of the road. But the legislature by acts passed more than ten years after the passage of the act of 1863, namely, on the 15th day of May, 1873, the 22d day of May, 1874, the 13th day of May, 1875, and the 20th day of April, 1892, recognized the existence of the corporation formed under the act of 1863, and granted to it other and further powers than those given to it by that act; and by an act passed as late as May 9, 1894, approved, ratified and confirmed any and all proceedings taken in substantial compliance with the provisions of chapter 361 of the Laws of 1863, as amended. By these acts, the legislature waived all forfeitures that existed at the time of their passage, if any such there were. The state which imposed the conditions may waive their performance. Matter of N. Y. El. R. R. Co., 70 N. Y. 327. It is also claimed by the plaintiff that the defendant corporation has not a legal existence, because the consent of the local authorities was not obtained, as required by sections 91 and 92 of the Railroad Law (chap. 676, Laws of 1892). This claim cannot be sustained, because the local authority referred to by the plaintiff was not in existence when the acts relating to the corporation were passed, and also because the act of 1892 does not class the person referred to by the plaintiff as a local authority among those whose consent is necessary to the existence of the corporation. The act of 1892 (§ 91) provides in effect that in the city of New York the common council shall be the local authority whose consent must first be obtained, and the evidence in this case shows that such consent has been obtained. There are many other claims made by the plaintiff against the existence of the defendant corporation, but most of them are based upon grounds which I have held to be untenable; the others are not of sufficient importance to merit a discussion. The acts incorporating the defendant railroad have frequently been before the courts of this state and never have been declared unconstitutional, although their constitutionality has been attacked. The complaint is dismissed, with costs. Judgment to be entered on notice.

Complaint dismissed, with costs.

ROBERT E. DUNHAM, Plaintiff, *v.* JOHN A. DE RAISMES et al., Defendants.

(Supreme Court, New York Special Term, February, 1898.)

When an annuity, not charged on realty, does not lapse upon a division directed to be made.

Where the will of a testator of large means, although failing expressly to charge upon his real estate a small annuity given to an executor for life, devises his residuary real estate to his executors with directions to them to pay the annuity out of the rents and profits and also to invest any surplus income, a further provision that all the real estate should be divided among his children and grandchildren when a certain child named should reach majority is not, in the absence of proof that there is no surplus income applicable to the payment of the annuity, to be taken as fixing the date when it shall cease, and the evident intention of the will that the annuity shall continue during the life of the executor will be respected.

ACTION for the construction of a will.

Saunders, Webb & Worcester, for plaintiff.

Parsons, Shepard & Ogden, for defendants.

RUSSELL, J. The payment of an annuity of $300 a year to the plaintiff from the estate left by the deceased, John F. J. De Raismes, is resisted by the defendants, as affirmatively averred in the answer on the grounds that the property of which the testator died seized consisted of real estate devised, subject to the payment of the annuity to his wife, to his children and grandchildren, when his son Francis John Joseph De Raismes should arrive at the age of twenty-one years, or at his decease prior thereto, and to be then divided; and that the annuity to plaintiff was not made a charge upon the real estate subsequent to the time the said Francis John Joseph arrived at the age of twenty-one years.

The testator left a large fortune and the will bears the easy tone of confidence that, after the payment of the debts, all the specific legacies and devises would pass to the beneficiaries according to the terms of the will; and there is no evidence that this confidence was not justified, or that, at the death of the testator, there was not sufficient personalty and realty, with a capac-

ity in the latter to earn sufficient rents and profits, to accomplish the testamentary wishes of the testator, as these different classes of property were blended in his testamentary disposition. In effectuating the purposes of the testator and seeking to find his primary and paramount intention, the element of an insufficient personalty to pay his debts is eliminated from the case, so that it becomes one purely of consideration as to the effectiveness of his legacies and devises.

The will evinces certain specific purposes and certain general ones in those bequests and devises. After bequeathing to his wife the household furniture and appurtenances, it gives an annuity to her of $4,800 during her natural life, to be paid in quarter-yearly payments, and charges the rents and profits of his improved real estate in the city of New York, during her life, for the payment of the annuity. He devises to her for life his farm and appurtenances for a home for herself and his infant children, and the remainder to his children and grandchildren. He bequeathes to his son-in-law, the plaintiff Robert E. Dunham, an annuity of $300 during his natural life, to be paid by his executors in quarter-yearly payments during that period. All the rest of his real estate, not thereinbefore devised, he gives to his children and grandchildren, and provides that when his son Francis John Joseph arrives at the age of twenty-one years, or at his prior decease, such residuary real estate shall be divided between the children and the grandchildren. He directs the executor to take charge of all his real estate so residuarily devised, and receive the rents and profits, pay taxes, the annuity given to the plaintiff and necessary expenses, crediting to each of his children and grandchildren yearly an equal share of the balance; but directing that such portion as should not be required for their support should be applied by the executors to making improvements by building or otherwise upon his real estate in the cities of New York and Brooklyn to the best advantage. Upon a division of the real estate, the accounts with the children and grandchildren should be adjusted and equalized and each charged an equal share of the moneys applied for improvements. All the rest of his personalty is given to his children and grandchildren, to be equally divided. He directs that a capital business advancement of $20,000 to two of his sons be charged to them in the distribution, and that John Adolphe, the surviving son of the two so advanced, until the adjustment and accounting before referred to, pay interest on $10,000 of such

capital sum at 6 per cent. for the use of the two grandchildren, the children of the deceased son, and that at the time of the adjustment and accounting, John Adolphe account for $10,000 of such capital sum, for the use of said two grandchildren. He provides for the surplus income of the rents and profits of his entire estate by direction for their investment on bond and mortgage until the adjustment and accounting. The plaintiff, Robert E. Dunham, was named as one of the executors, but was removed for some cause, not apparent, prior to the time reached for the division referred to in the will.

The case seems to be one which does not even present a question of inadequacy of any of the funds devoted to that purpose for the payment of the legacies, but rather a case where it is assumed that the personalty was distributed before the period of final division, and, nothing being left but real estate, whether that shall be followed into the hands of the devisees to enforce the further payment of the annuity which ceased to be paid on the 17th day of September, 1882, when the son Francis John Joseph De Raismes became of age. It is not apparent, however, that such a distribution was effectively made and the evidence is meager upon the subject.

Trying to effectuate the intentions of the testator so that its purpose may not fail of achievement, where means are adequate, the general rule does not compel the strict adherence to the words contained in the testament, but the whole will may be construed to ascertain whether the testator limited the legacy or intended it to go to the legatee at all events. Pierrepont v. Edwards, 25 N. Y. 128; Delaney v. Van Aulen, 84 id. 16.

The testator gives to the plaintiff an annuity of $300 per year to be paid during his natural life. That purpose will be defeated if the life payment is shortened, by force of the testator's ineffective language, to a shorter term. If distribution of the personalty was made before the annuity payments ceased it was so done without provision for the capitalization of a sum sufficient to provide for the annuity and a sufficient amount, viz., the sum of $10,000 was, by the design of the will, left to the period of division of the real estate. The annuities both to the wife and the plaintiff were to be currently paid out of the rents and profits; but no intimation is contained in the will that those payments were to cease upon the division of the property among the children and grandchildren. And a contrary intent is evident from the careful direction to vest surplus income in improvements on the real estate

to the extent desirable, and the surplus over that expenditure to accumulate in bonds and mortgages. The naming of the plaintiff as one of the executors too, to the mind of the testator, gave him the practical power to see that sufficient provision was made for the payment of annuities during the term of their lives; and the subsequent removal of the plaintiff as executor, before the period of division, was an event not foreseen by the testator in making the will. The personalty, the rents and profits and the realty are so blended in this will, construed as a whole, that it is apparent that the testator did not intend residuary legatees and devisees to receive the shares going to them, except as distributions remaining after the specific purposes of the will were accomplished. It is conceded that the wife's annuity should be paid, even after the division, as a charge upon the realty; and though the language of the will is more specific in regard to her than the son-in-law, as her legacy was of far greater importance, yet the purpose of the continuance of both annuities, during the life of the beneficiaries, seems to be the same as to each.

I look in vain through the will to find any purpose of the termination of the legacy before the death of the plaintiff. I find in the whole theory of the will, as exhibited in the clauses bequeathing and devising the rest of his property, and in the evident assumption of plenty of means for the purpose of paying his annuities, sufficient grounds to believe that the testator's plainly declared gift of an annuity for life was not intentionally shortened by him in the other clauses of the will.

It may be that the surplus rents and profits, including that which went into the real estate for improvements, was sufficient to provide a fund to pay the annuity to the plaintiff; and if not, that the personalty was more than sufficient. It needs a farther inquiry in this action, by reference or otherwise, to determine whether it shall be necessary to resort to the real estate now in the hands of the general devisees. Judgment is, however, awarded that the plaintiff's annuity from the 17th of September, 1882, with interest from the periods when the payments respectively became due, be a charge upon the personal and real estate left by the testator and existing on said 17th of September, 1882, and that a reference be awarded to ascertain out of what fund and from what defendants the same shall be paid, in order to carry the interlocutory judgment into effect.

Ordered accordingly.

JULIUS RUGE, Plaintiff, *v.* PATRICK GALLAGHER et al., Defendants.

(Supreme Court, New York Special Term, February, 1898.)

New York city — Discharge of municipal liens.

As the General Lien Law (Laws of 1897, chap. 418) did not expressly repeal the provisions of the Consolidation Act (Laws of 1882, chap. 410, § 1836, as amended by the Laws of 1895, chap. 605), relative to the manner of discharging liens filed against funds held by the city of New York, an undertaking which follows the terms of the Consolidation Act is still a proper method of discharging such a lien.

JUSTIFICATION of sureties upon an undertaking given under the Consolidation Act (Laws of 1882, chap. 410, § 1836, as amended by Laws of 1895, chap. 605), to discharge a mechanic's lien, filed on November 17, 1897, in the office of the comptroller of the city of New York, against moneys due and to grow due the defendant Gallagher for work done on the male and female almshouses on Blackwell's Island.

Robert J. Mahon, for plaintiff.

Charles H. Broas, for defendants.

BISCHOFF, J. I think that this lien may properly be discharged by an undertaking, although claimed against a fund held by the municipality. The act relating to the discharge of municipal mechanics' liens (chap. 605, Laws of 1895) authorizes this practice, and, taken as a part of the Consolidation Act, which it amends, such act is not, apparently, affected by the charter of the city of New York, with regard to this subject. Nor can the law referred to be taken as repealed by implication, because not fully embodied in the General Lien Law of 1897 (Laws of 1897, chap. 418, § 20). That statute contains a schedule of the laws thereby repealed, of which the former act is not one, and we have, therefore, an expression of the legislative intent not to repeal such act. People v. Koenig, 9 App. Div. 438. Repeals by implication are not favored, and, failing an apparent intent of repeal by the later act, the earlier must be deemed in force, unless manifestly inconsistent with or repugnant to the later. Id. Here, the two acts are not necessarily inconsistent, since the Lien Law of 1897 (§ 20), while setting

forth the methods whereby a municipal lien may be discharged, does not express these methods to be exclusive of others which might exist by law, and the statute of 1895 may be read with such law, as providing an additional method of discharge.

Ordered accordingly.

THE AMERICAN SURETY COMPANY OF NEW YORK, Plaintiff, *v.* MOSES R. CROW et al., Defendants.

(Supreme Court, New York Trial Term, February, 1898.)

1. **Indemnitors — Inconsistent parol agreement that an indemnitor shall not be liable — An attorney as an indemnitor.**

   An indemnitor of a corporation, which, upon the faith of an agreement of indemnity, became surety upon an undertaking given upon appeal from a judgment, cannot, in an action subsequently brought upon the agreement, be permitted to show by parol an alleged contemporaneous agreement, by the terms of which his execution of the indemnity agreement was to be purely formal, while the corporation was to look for actual indemnity solely to a coindemnitor; nor does the fact that the indemnitor was an attorney-at-law affect his liability.

2. **Same — Extension of time.**

   An extension of time, given by the party indemnified, to a surety will not discharge a cosurety where he has not been in any manner prejudiced by the extension.

3. **Same — Application of payments.**

   Application of payments in favor and against indemnitors.

ACTION against sureties on indemnity agreement.

John J. Crawford, for plaintiff.

Franklin Bien, for defendant Crow.

MCADAM, J. The Shickle, Harrison & Howard Iron Company on August 20, 1889, recovered a judgment against Rowland N. Hazard and others for $16,974.15, from which Hazard appealed to the Supreme Court, General Term; and the plaintiff herein, at the request of the defendants herein, executed the usual statutory undertaking thereon, whereby it obligated itself that the appellant

would pay the judgment if affirmed on such appeal, together with all costs awarded on such affirmance. The complaint alleges and the answer admits "that in consideration and as a condition of the execution by this plaintiff of the undertaking aforesaid, the defendants herein, by their agreement in writing, signed with their names and sealed with their seals, promised and agreed with this plaintiff, that they, the said defendants, should and would at all times indemnify and keep indemnified, and save harmless this plaintiff from and against all loss, damages, costs, charges, counsel fees and expense whatsoever which plaintiff might for any cause, at any time, sustain or incur by reason or in consequence of having executed the said undertaking." Thereafter, and on January 9, 1891, the said judgment was affirmed, with $112.17 costs. Hazard failed to pay the judgment, and the plaintiff on January 30, 1891, was obliged to and did pay $18,557.80 in settlement thereof. It was objected that the trial could not proceed against the defendant Crow on the ground that the action was not at issue as to his two codefendants and joint obligors, Thurber and Hazard, process not having been served upon them. The same objection was made when the cause was ordered on the calendar; but it was overruled, and an appeal from the order was dismissed by the Appellate Division. This ruling is, therefore, accepted as settling the law of the case in respect to the point raised. Apart from certain credits claimed by the defendant Crow, which will be hereafter considered, he places his defense upon the grounds: (1) That he was interested on the appeal as the attorney for Hazard, the defeated defendant; that Horace K. Thurber had been accepted by the plaintiff as a satisfactory indemnitor; that Mr. Nugent, who was then secretary of the plaintiff and in charge of the bond department, stated that he desired Mr. Crow to execute the indemnity agreement to satisfy the rules of the company, which required two indemnitors, but that the execution of the bond by him was to be regarded as formal only, for he would not be holden thereon, as the plaintiff would look for indemnity exclusively to Mr. Thurber, by whom it was to be secured. Crow testified that such was the arrangement under which he became surety. Mr. Nugent, on the other hand, denies that there was any such understanding, and testified that while the rules of the company do not direct the taking of any fixed number of sureties it required two in this instance, and he was, therefore, particular enough to require Mr. Crow to justify before he would accept him — a course not likely to be pursued

with a nominal surety. The indemnity agreement shows that Crow did justify by affidavit, showing the ownership of $150,000 worth of property, which he particularly specified. While an instrument not under seal may be delivered upon condition, the observance of which as between the parties is essential to its validity (Bookstaver v. Jayne, 60 N. Y. 146; Benton v. Martin, 52 id. 570; Higgins v. Ridgway, 153 id. 130), it is not admissible to show a contemporaneous parol agreement inconsistent with that which is written and tending directly to nullify it. Gordan v. Niemann, 118 N. Y. 152; Thomas v. Scutt, 127 id. 133; Grocers' Bank v. Murphy, 9 Daly, 510; Russell v. Kinney, 1 Sandf. Ch. 34; First Nat. Bank v. Tisdale, 18 Hun, 151; affirmed, 84 N. Y. 655; Davis v. Randall, 115 Mass. 547. The indemnity bond was given to induce the plaintiff to become surety on the undertaking on appeal; and the plaintiff was induced thereby to incur the liability indemnified against, so that the obligation is founded on a valuable consideration. In this respect the case differs from Higgins v. Ridgway, *supra*, which was an action on a promissory note without consideration, delivered upon condition that the maker should not be liable thereon. Crow is evidently mistaken in supposing that any such inconsistent oral understanding was had, for the parties in interest intended and acted on the intention that he should be holden according to the terms of the sealed obligation. The fact that Crow was attorney for the principal does not affect his liability as surety. The obligation was not an ordinary court bond; if it had been, he might have been rejected by the court because of his relation to the principal; but where no such objection is made by the creditor, even an attorney may become liable. Fexwell v. Bowerman, 2 East, 182; Banter v. Levi, 1 Chitt. 713; Bell v. Gate, 1 Taunt. 162. (2) That the plaintiff settled all liability on the bond with Thurber, the cosurety, by accepting from him notes, stocks and securities, whereby Crow was discharged. Thurber did give a six months' note for the demand, secured by stock of the Hazard Co., which note, after the payment of six months' interest, was renewed by another at three months. But these promises to pay were not given or accepted in satisfaction, and were not so to operate unless followed by payment. They were unperformed, and nothing was realized from the stock. The broken promises to pay did not discharge the sealed obligation sued upon. Where time is given to the principal debtor without the consent of the sureties they may be discharged; but the mere

giving of time to a cosurety whose obligation is equal will not discharge the other if not prejudiced thereby. Draper v. Weld, 13 Gray, 580. The acts of Thurber in further securing the plaintiff in no manner prejudiced his cosurety, Crow, and did not discharge the liability of either on the bond. These defenses being unavailing, the next question arises as to what, if any, credits the indemnitors are entitled to on account of collections made by the plaintiff in proceedings founded on the judgment secured, and of which it afterwards became the owner by assignment. The agreement with Thurber respecting the Thirty-eighth street house clearly shows that the interest taken by him in that transaction was to protect his liability on the bond in suit, and that the profit made thereon by the plaintiff should be credited on the indemnity obligation, for he was interested in discharging that obligation, and that only. The indemnitors must also be credited with so much of the moneys collected in the surplus proceedings on the Waverly place property, as are properly applicable to the iron company's judgment, upon the principle decided in the Matter of Hazard, 73 Hun, 22; affirmed, 141 N. Y. 586; and see Goetz v. Mott, 21 Abb. N. C. 246. The moneys realized on the attachment against the Narragansett property were properly applied to the Wing judgment because collected in proceedings founded upon it. 2 Am. & Eng. Enc. of Law (2d ed.), 459. The $1,000 received on the Thompson claim came from one Moriarty, who was interested in having it applied on the Thompson liability, with respect to which he was co-obligor. These two items cannot be credited to the defendants. No specific application of the moneys was made by the creditor until the cause was on trial, and after the right had vested in the court to make such application as would have been made if the parties in interest had acted in the matter. 2 Am. & Eng. Enc. of L. (2d ed.), 447. Indeed, in a case of payments other than by the voluntary act of the debtor, there is generally no question of application by the parties. Id. 459; Orleans Co. N. Bk. v. Moore, 112 N. Y. 543. The principal and interest account between the parties stated, according to these views, leaves a balance of $8,823.13 due to the plaintiff. Judgment accordingly, with costs, and $200 allowance.

Judgment accordingly, with costs and $200 allowance.

WILLIAM FERRIS and MARY A. BYRNE, as Administrators of MARY A. FERRIS, Deceased, Plaintiffs, *v.* EUGENE FERRIS, JR., Individually and as Executor of the Will of EUGENE FERRIS, Deceased, Defendant.

(Supreme Court, Kings Special Term, February, 1898.)

Release — Consideration — Fraud and undue influence — Burden of proof.

Releases, executed by an intelligent woman over eighty years of age, to her son of all claims against him as her agent in collecting the income of her life estate under the will of her husband, should not, in an action for an accounting brought against him by her administrators, be set aside as procured by fraud and undue influence, merely because they lack a valuable consideration, for, where it appears that the son was the favorite of his parents, that he and his family lived with his mother, and that he was largely preferred over other children by the will of his father, the legal presumption that the dominant party has taken advantage of the weaker is sufficiently rebutted.

THIS is an action by the administrators of Mary A. Ferris, deceased, against her son, Eugene Ferris, Jr., for an accounting. The said Mary A. Ferris died intestate in January, 1897. Her husband, Eugene Ferris, died in April, 1887. They resided in Brooklyn. Five children, two of them sons (the defendant being one of them), survived the said parents. A son of a deceased son also survived them. The daughters were all married. One lived in Washington, D. C., one in Atlantic City, N. J., and one in Brooklyn. The sons were both married, and lived in Brooklyn. The defendant was 31 years old when the father died. He was in business with his father as partner. He had always lived with his parents, and continued to do so after his marriage, and when his father died he and his wife and children and his mother continued as one family in the same house, which was owned by the father. The defendant has eight children. The father also owned a summer residence, a bond and mortgage for $3,000, and a lot and building in New York city worth about $100,000, in the store of which he and the defendant carried on their said business. The value of the said other real estate is not given. By his will the father left all of his estate to his widow for life. To the defendant he left the said business, and the use of the said store,

for which he was required to pay a rent of $2,400 a year to the widow. Upon the death of the widow the entire estate was given to the defendant, except a legacy of $10,000 to each of the said daughters, of $5,000 to the son William, of $5,000 to the said grandson and of $1,000 to a niece. The defendant was thus given more than half of the estate. The widow and the defendant were named executors, and upon her death the settlement of the estate was intrusted to him. The collection of the income during the life estate was not intrusted to the executors by the will. The widow intrusted such collection and the management of the estate to the defendant. He collected about $200 a month of income, besides the rent for the said store due from him, making him chargeable with about $4,800 a year during the ten years of the life estate. Of this he gave the widow about $1,800 a year. He also occupied the said two residences with her without paying anything therefor. She executed three general releases to him on account of any obligation or indebtedness by him to her growing out of such relation, viz., one on May 6th, 1891, one on October 7th, 1893, which was confirmed on December 7th, 1893, and one on January 13th, 1896, and they are pleaded as defenses. They are in terms for sums stated, and love and affection. The defendant was very low in sickness, and not expected to recover, when the second was executed, and it recites that fact. They were prepared by the defendant's attorney, and he had each executed. The mother was on affectionate terms with the defendant and his wife and children, and the household was happy and harmonious. The great preference given to the defendant by the father's will caused some coldness toward him by the other children, and with the exception of the one daughter that lived in Brooklyn, they seldom saw their mother. They all had free access to her. She was affectionate to all her children, and made regular presents of money to her daughters, and also made a gift *causa mortis* to one of them of $500 when ill a year before she died. She was 86 years old when she died. She was of a somewhat delicate and feeble habit of body, but she was an intelligent woman, and her intellect was not impaired.

Josiah T. Marean, for plaintiffs.

Peter Condon, for defendant.

GAYNOR J.: The question here is not whether the mother knew what she was doing when she signed the releases, but how her in-

tention to do so was produced. If not produced by fraud or undue influence, the releases must stand. If a trustee purchase the trust property of himself, or at his own sale, or deal with himself in any way in respect of it, the transaction is voidable at the election of the beneficiary, without regard to whether it is for an adequate consideration, or advantageous to the beneficiary (Dodge v. Stevens, 94 N. Y. 209). But this rule does not apply to a trustee dealing with an adult beneficiary concerning the trust property. If a trustee so deal directly with the beneficiary, the transaction is not voidable at the election of the beneficiary, but only by a court of equity for fraud or undue influence, provided it be found unfair to the beneficiary (Graves v. Waterman, 63 N. Y. 657; Perry on Trusts, sec. 195). And in such a suit, proof of the bare trust relation alone makes out a *prima facie* case for the plaintiff. The burden is thus put upon the trustee to show clearly and conclusively that the transaction was fair, and the free act of the beneficiary, in order to have it upheld. It is sometimes said that mere proof of the relation of parent and child (or the reverse, as in the present case), or of guardian and ward, husband and wife, attorney and client, physician and patient, or priest and penitent, without any additional relation of trustee and beneficiary, is sufficient in itself to make out a *prima facie* case of fraud or undue influence, and put the dominant party to his proofs; but upon close examination and analysis, this, it seems to me, is found not to be true, but that lack or inadequacy of consideration, and often particular facts of the relation, pointing to fraud or undue influence, need to be shown by the plaintiff in such a case (Will of Smith, 95 N. Y. 522; Carpenter v. Soule, 88 N. Y. 251; Cowee v. Cornell, 75 N. Y. 91; Bispham's Eq., part 2, chap. 2, sec. 3). I think, however, that the present case comes under the rule applicable to trustee and beneficiary, with the additional relation of son and mother, to either weaken or strengthen the transactions complained of. If the mother were alive, and the plaintiff here, this would clearly appear to be so. The defendant bore a relation of trust to her which subjects him to that rule. He collected the income of her life estate, made the necessary expenditures, and was accountable to her for the balance. This was an agency which put him in a position of trust to her. Bare proof of this relation therefore made a *prima facie* case for the plaintiffs. But more than that was proved. The special facts and circumstances of the relation of son and mother were shown, and I think they were sufficient to rebut not only the presumption created by the *prima facie* case,

established by proof of the bare relation of trustee and beneficiary, but also the effect of the proof of lack of full valuable consideration for the releases. The defendant was evidently the favorite child. This is evidenced by his business partnership with his father, his living from birth with his parents, both before and after marriage, and the great preference given to him by his father's will. And it is evident that the mother's affection and preference for him and his grew from her happy home life with him and his wife, and their eight growing children, during the ten years of her widowhood. It would be strange had it been otherwise; and that she was influenced by affection or gratitude is legitimate (Marx v. McGlynn, 88 N. Y. 370). On the other hand, no cause for growing affection toward her other children existed. She was free to do as she chose with her life income, and that she gave it to the defendant under the circumstances is not extraordinary. The like is very common and is to be expected. To find fraud or undue influence therefrom would seem to be contrary to the probable truth. Reasons for the making of the releases being so apparent, it would not do to find fraud or undue influence from the mere trust relation. The mother was very old, it is true, but all the evidence shows that she was intelligent, free to come and go, and betrayed no mental failing. It is also to be noted that the defendant was very low from sickness, and not expected to recover, when the mother executed the second release. His condition goes to show that he did not induce her to that act by fraud or undue influence.

Let the account be therefore taken only from the date of the last release.

Ordered accordingly.

PHILIPP VON HAGEN, Plaintiff, *v.* THE WATERBURY MANUFACTURING CO., Defendant.

(Supreme Court, Kings Special Term, February, 1898.)

Breach of contract for a sale of goods — General denial — Insufficient "defence," stating no new matter.

A general denial, interposed to a complaint for a breach of a contract to sell and deliver goods, puts the plaintiff to proof of the entire contract, and enables the defendant to prove any facts which go to show that it was not made; and hence a "defence," subsequent to the general denial, which alleges that a person with the same surname

as, but a different Christian name from, that of the plaintiff asked the defendant to manufacture for him the same goods, and that it refused to do so because a required deposit was not given, must be stricken out, as it states no new matter and is not a defence, within the Code of Civil Procedure, § 500, subd. 2.

MOTION to strike out allegations pleaded as a defence. The complaint alleges the breach of a contract by the defendant to sell and deliver to the plaintiff certain specified merchandise, and prays for damages. The answer contains in substance a general denial, and then pleads as a "defence" that one Jacob von Hagen asked the defendant to manufacture and deliver to him the said merchandise; that the defendant informed him that it would not make the contract without a deposit of $300 being made; that such deposit was not made by the said Jacob von Hagen, and the defendant did not manufacture and deliver the goods.

Emley & Rubino, for motion.

Byran L. Winters, opposed.

GAYNOR J.: This is one of those answers which so often bother trial judges. The so-called "defence" is no defence. A defence can only consist of new matter, viz., facts outside of the issue raised by a general or special denial (Code Civ. Pro. sec. 500). First come denials in an answer, and then defences if there be any. The distinction between them is shown in the rule that while a "defence" may be stricken out as sham, a denial may not be (Wayland v. Tysen, 45 N. Y. 281). Nothing may be pleaded as a defence which may be proved under a denial (Flack v. O'Brien, 19 Misc. Rep. 399; McManus v. Ins. Co., 22 Misc. Rep. 269; Green v. Brown, 22 Misc. Rep. 279). The burden of proof is on the defendant upon an issue made by a defence, and facts should not be pleaded as a defence if the burden of proving the issue to which they belong is not on the defendant. This is the test to go by. The general denial in this answer raises the whole issue. It puts the plaintiff to the proof of the alleged contract, and enables the defendant to prove any fact which disproves the making of it. If, therefore, Jacob von Hagen, named in the alleged defence, were to be considered as Philipp von Hagen, the plaintiff, the facts stated are not a defence, but are embraced within the general issue.

Motion granted.

LUCY MILLER et al., Plaintiffs, *v.* WILLIAM J. MILLER et al., Defendants.

(Supreme Court, Kings Special Term, February, 1898.)

1. **Will — A bequest of real estate not transferring to the legatee mortgages upon it owned by the testator.**

   A provision contained in the will of a testator that, "As my wife, Jane G. Miller, has in her own name real estate which was earned by her and myself together, I hereby give, devise and bequeath to her all my right and interest therein and request her to release her right of dower in my residuary estate", does not transfer to the wife the interest of the testator in bonds and mortgages originally given by him and his wife and assigned to him several years after he made his will; but they are enforcible against her only to the extent of one-half of their amount.

2. **Dower — Election.**

   The request of the testator, that the wife will release her dower in the residuary estate, does not put her to an election, as mere precatory words are insufficient for that purpose; the rule being that in order to compel an election, it must appear that the testamentary provision was intended to be in lieu of dower.

ACTION for the construction of a will and for partition. Title comes through the will of James P. Miller, of whom the parties are the children and widow. It was executed September 18th, 1884, and he died in 1895. The third clause is as follows: "As my wife Jane G. Miller has in her own name real estate which was purchased with money earned by her and myself together, I hereby give, devise and bequeath to her all my right and interest therein and request her to release her right of dower in my residuary estate." At the time the said will was executed there were two outstanding mortgages on the real estate thus devised, to secure two bonds of $2,500 each executed by the said widow and the testator. On January 3rd, 1887, the testator purchased the said bonds and mortgages, and they were assigned to him. It is now claimed in behalf of the widow that the said mortgages are included in the said devise to her. It is claimed by the children that the said devise was in lieu of her dower, and put her to her election.

Wilson M. Powell, for plaintiffs.

William H. Willits, William F. Connell and G. B. Van Wart, for defendants.

GAYNOR J.: I do not think that a devise like this one, of all the "right and interest" of the testator in real property, ever included the interest secured by mortgages on real property. Whatever doubt one may have on this head comes from a lack of discrimination in respect of the former double nature of such mortgages, arising from the different effect given to them at law and in equity. In law the mortgage was held to convey the fee, subject only to being defeated by a compliance with the condition on the exact day appointed. The mortgagee could maintain ejectment to get possession of the land; and his estate therein descended to his heir, or was embraced within a general devise of realty. But the court of chancery would not have this, and regarded a mortgage as only a security for the debt. It regarded the debt as the principal thing, and the mortgage as a mere incident, and by entertaining a bill to redeem upon payment of the debt, even after default, it practically nullified the rule at law. It was thus of no practical use to say that the dry, technical estate of the mortgagee descended to his heir, or followed his general devise of realty, for in equity both the debt and the mortgage were held to go as personalty to the personal representative, and if the heir had possession of the land he was held to have it as trustee for the personal representative; and the rule in equity was the one followed by the ordinary (Demarest v. Wynkoop, 3 Johns. Ch. 145; Washb. B'k I, pp. 479, 511). It is thus seen that the rule at law that an interest acquired by a mortgage of land descended to the heir, or followed a general devise of realty, was based upon the rule that such a mortgage vested the fee in the mortgagee, and that the mortgage was not personalty; but that this rule was frustrated in its application by the relief obtainable under the contrary rule in equity.

But all this nicety was made obsolete by the enactment in the Revised Statutes of 1830 (2 R. S. p. 312, sec. 57), that no action of ejectment should thereafter be brought by a mortgagee to recover possession of the mortgaged land. The equity rule was thereby made the rule at law, for it could no longer be said that the mortgagee had even a technical title when his right to pos-

session was taken away. A mortgage upon land cannot therefore be claimed with us to be an interest in real estate. It is personalty only (Trimm v. Marsh, 54 N. Y. 599).

Therefore, if the general rule that a will speaks as of the date of the testator's death, be applied here, this devise does not include the said mortgages. But the facts and the language used seem to exclude the application of such rule. The testator did not own the mortgages when he made his will, but acquired them several years afterwards; and moreover he expresses in the clause in question the restricted intention of devising to his wife the interest he supposed he then had in the land, by reason of the purchase money having been in part his, though the title was taken in her name. He had in mind such purchase money paid by him, and that he had a part interest in the land by reason thereof. That he afterwards acquired the outstanding mortgages cannot be used to enlarge such intention (Rogers v. Rogers, 153 N. Y. 343). The oral evidence taken on the trial to show that the testator acquired the said mortgages for the purpose of having the land go to his widow free of them, and that he thought they would be extinguished by the terms of the said devise to her, is equally incompetent to enlarge the effect of the words of such devise.

But the bonds which the said mortgages were made to secure being executed by both the testator and the widow, it follows that the said mortgages are a lien in the hands of the executors for only one half of the sums secured thereby.

The request at the end of the said devise that the widow release her dower in the residuary estate, did not put the widow to her election in respect to dower. Similar precatory words have often been held to be mandatory for the purpose of creating trusts, and sometimes in the cutting down of the meaning of the general words of bequests and devises; but I know of no authority for applying that doctrine to the construction of a will on the question of whether it puts the widow to her election. On the contrary, no mere request can put her to such election. She can be put to it only by express words to that effect in the will, such as a bequest or devise in lieu of dower, or by the taking of dower being inconsistent with the provisions of the will, where provision is made therein for her, so that the scheme of the will and the admeasurement of dower cannot both be carried out. It must appear from the will that the husband did not intend that his wife should take both dower and the provision he makes for her therein, in

order to require her to elect which she shall take (Closs v. Eldert, 16 Misc. Rep. 104).

The fourth clause of the will does not effect an equitable conversion of the land into personalty, nor create a trust, but only confers a discretionary power in trust for the purpose of sale and distribution, and this does not stand in the way of a suit for partition (Mellen v. Banning, 72 Hun, 176; Palmer v. Marshall, 81 Hun, 15).

Let judgment be entered accordingly.

JOHN B. HICKS, Plaintiff, *v.* THE NEW JERSEY CAR SPRING & RUBBER CO., Defendant.

(Supreme Court, Kings Special Term, February, 1898.)

Services — Insufficient defence, stating the cause of discharge — Bill of particulars.

An allegation, that the defendant discharged the plaintiff from its service "for good and sufficient cause, and particularly for disloyalty to its interests, and for conduct and actions harmful and injurious to its business", states no new matter, i. e. facts constituting a defence, and is a mere conclusion of law; but where the plaintiff has treated it as a defence, the defendant may properly be compelled, by an amended answer or by a bill of particulars, to give the specific facts and the time of their occurrence.

ACTION for damages for breach of a contract of service by a discharge. Motion for a further bill of particulars.

Wray & Pilsbury, for motion.

Robert Thorne, opposed.

GAYNOR J.: The particular facts constituting a valid cause for the discharge of an employee during the fixed term of service contracted for must be pleaded as a defence, in an action for damages for breach of the contract, in order to be proved (Linton v. Unexcelled Fire Works Co., 124 N. Y. 533). The defence pleaded here is that the defendant "discharged the plaintiff for good

and sufficient cause, and particularly for disloyalty to its interests, and for conduct and actions harmful and injurious to its business." This is no defence. A defence is a statement of new matter, viz., matter outside of the general issue sufficient to defeat the plaintiff's cause of action (Code Civ. Pro. sec. 500). This is not a statement of new matter, viz., of facts constituting a defence. No facts are pleaded, but only a conclusion of law. But as the plaintiff is content to consider it a defence, the defendant must either by an amended answer, or by a bill of particulars, give the specific facts constituting the defence, with the time of their occurrence.

Motion granted, with $10 costs.

ANN CURTIN, Plaintiff, *v.* THE METROPOLITAN STREET RAILWAY CO., Defendant.

(Supreme Court, New York Special Term, February, 1898.)

Appeal from Appellate Term to Appellate Division — Leave — Newly designated Appellate Term.

The provisions of the Constitution of 1894 (art. 6, § 5), and of the Code of Civil Procedure, § 1344, are applicable to the Appellate Term of the Supreme Court, and an application to it, for leave to appeal to the Appellate Division, is properly made at the next term after the decision was rendered, and this although, because of a new designation of justices, its members did not render the decision sought to be reviewed.

APPLICATION made by defendant to Justices Daly, McAdam and Bischoff, who held the Appellate Term during the year 1897, for leave to appeal from a decision rendered by them at the December, 1897, term to the Appellate Division.

H. A. Robinson, C. F. Brown and J. T. Little, Jr., for motion.

Charles Steckler, opposed.

MCADAM, J. The State Constitution (art. 6, § 5) provides that "appeals from inferior and local courts now heard in the Court of

Common Pleas * * * shall be heard in the Supreme Court in such manner and by such justice or justices" as the Appellate Division shall direct. Similar language is found in section 1344 of the Code; and it is further provided that the "justice or justices by whom such appeal was determined may allow an appeal to be taken" to the Appellate Division. The name "Appellate Term" is purely an arbitrary designation, apparently justified by the rules and regulations pertaining to such appeals, for it is nowhere found in the Constitution or the statute.

The assignment of Justices Daly, McAdam and Bischoff to hold the Appellate Term ceased December 31, 1897, and thereafter all power to hear appeals from the City Court and District Courts, or any applications in respect thereto, passed to Justices Beekman, Gildersleeve and Giegerich, who were duly assigned to hear such appeals during the year 1898, as fully as if the official terms as Supreme Court justices of those previously designated had expired by lapse of time.

The words "justice or justices" in the constitutional and Code provisions are used in the same sense as are the words "the General Term from whose decision or determination such an appeal shall be taken," in section 11 of the former Code (as amended in 1874); and these last quoted were held to include the succeeding General Term, though composed of different justices. Sprague v. Western U. T. Co., 64 N. Y. 658.

The application for leave to appeal to the Appellate Division was, therefore, properly submitted to Justices Beekman, Gildersleeve and Giegerich at the January (1898) Term, and cannot be entertained by their predecessors. Such submission was in strict conformity with Rule VII of the Supreme Court rules regulating the hearing of appeals from the City Court and District Courts. This rule requires that the application for leave to appeal be made at the next term after the announcement of the decision sought to be reviewed; which confirms the conclusion that the hearing must be before the justices having authority to hold said term.

The application for leave to appeal submitted to the justices at the January (1898) Term appears to have been denied by them; and if the appellant needs any relief it can be had only by obtaining a reargument of the motion so submitted.

DALY and BISCHOFF, JJ., concur.

Application denied.

EUGENE K. SMITH, Plaintiff, *v.* ALICE KETELTAS et al., Defendants.

(Supreme Court, New York Special Term, February, 1898.)

Guardian ad litem for incompetent defendant — Appointment — Leave to sue — Code of Civil Procedure, § 428.

A guardian *ad litem* cannot be appointed *ex parte*, under the Code of Civil Procedure, § 428, for an incompetent defendant in an action, where no leave to sue has been first obtained as that section authorizes such an appointment only after legal service of the summons upon him and upon his committee; and where no such leave has been obtained, the service of the summons is improper, and the appointment of the guardian *ad litem* and the service must be set aside.

MOTION to set aside service of summons and complaint on incompetent defendants, because action was commenced without permission of court.

Parsons, Shepard & Ogden, for motion.

C. Bainbridge Smith, opposed.

TRUAX, J. It was held in Soverhill v. Dickson, 5 How. Pr. 109, that an action could not be brought against a lunatic, for whom a committee had been appointed, without an application to this court, although the third subdivision of section 134 of the Code of Procedure provided for the service of a summons upon the committee of the lunatic and upon the lunatic personally. To the same effect is Matter of Delahunty, 28 Abb. N. C. 245, decided in 1892 by the General Term of the first department. "It has been supposed," said Judge Welles, in Soverhill v. Dickson, "that section 134 of the Code authorized the commencement of the action at once and without first applying for leave to prosecute. But this cannot be so. It only provides who the summons shall be served upon, where an action is to be commenced." The second subdivision of section 426 of the Code of Civil Procedure is no broader than subdivision 3 of section 134 of the Code of Procedure. In the case now before me a guardian *ad litem* was appointed *ex parte*, and it is claimed that such an appointment is authorized by section 428 of the Code of Civil Procedure. That section au-

thorizes the appointment of a guardian *ad litem* only when it appears that the interest of the committee "to whom a copy of the summons has been delivered is adverse to that of the defendant." That is, section 428 authorizes the appointment only after the service of the summons upon the committee and the defendant as prescribed by subdivision 2 of section 426. But it has been shown that such a service can legally be made only after leave of the court has first been obtained. No such leave having been obtained in this case, the service of the summons on the committee and the appointment of a guardian *ad litem* should be set aside. Motion granted, with $10 costs.

Motion granted, with $10 costs.

DANIEL ROSENBAUM, Plaintiff, *v.* ANNA H. SILVERMAN et al., Defendants.

(Supreme Court, New York Special Term, February, 1898.)

1. **A mortgage executed to evade a power of sale — Bona fide purchaser.**

A bona fide purchaser of a recorded mortgage who, before purchasing it, procured affidavits as to its validity and value from the mortgagor and from one of the executors of an estate against which it was chargeable, will be permitted to enforce it by foreclosure although it is based upon a title which resulted from a fraudulent device by which executors, having merely a power of sale, by means of a transfer to a friendly third party and a retransfer from him to an heir, procured the mortgage to be given by the latter to the end that the executor, who attested its validity and value, might raise money upon it for his private uses.

2. **Same — Usury.**

Semble, that a mortgage, valid in its inception, may be purchased at a price less than its face, and is not invalidated by a subsequent extension at an usurious rate of interest.

ACTION of foreclosure.

Bernard Metzger (William King Hall and David B. Ogden, of counsel), for plaintiff.

Benjamin N. Cardozo (Alfred Lyons, of counsel), for defendants.

RUSSELL, J. The validity of the mortgage sought to be foreclosed is attacked as given by a sham purchaser to evade the will of the testator Henry W. Silverman, and also as usurious. The real estate covered by the mortgage was a part of that left by the testator who gave a power of sale to his executors Ernestine Silverman, wife, and Robert H. Silverman, son, and two others who did not survive. The executor, Robert H. Silverman, desirous of raising money for his own private purposes, procured his mother to join with him in an executor's deed to a friend, Albert Gans, *pro hac vice*, and the grantee to execute back two purchase-money mortgages for the full consideration, one of $15,000 and the other for $20,000. The next day Gans deeds the lands subject to the mortgages to one of the three children of the testator, Anna H. Silverman, who, shortly after, signs, without acknowledging, a mortgage for $5,000 and one for $15,000 in place of the $20,000 purchase-money mortgage which was discharged. The $5,000 mortgage was acknowledged on the 26th of November, 1894, more than four months after the executors' deed and the purchase-money mortgages, and was the same day recorded and assigned to the plaintiff, who paid for the mortgage $4,636.13. The purchaser took affidavits from the executor Robert H. Silverman and the grantee Anna H. Silverman of the good faith and valuable character of the consideration before parting with his money.

The whole transaction was a fraud upon the estate of the testator. The power of sale, not covering the power to mortgage, became necessary for resort in order to obtain securities which could be sold by the executor, Robert H. Silverman, and the proceeds applied to his own personal uses. The whole transaction was void as against the interest of the estate, and the mortgages given by the mock purchasers unenforcible, unless equitable considerations should give them sufficient life so that by their means the title might be brought back into the executors or beneficiaries for the protection of the estate itself. As between the persons who granted the title and the successive purchasers, no rights of action could be maintained in the courts because both were parties to a fraudulent scheme. Doubtless an innocent devisee, or possibly the executors as trustees, might maintain an action to set aside the apparent conveyance and incumbrances, and it would not be necessary to enforce the lien of the mortgages, which lien was itself created in fraud.

Assuming, then, that the mortgages were void in the hands of the executors, could they convey a better title than they had them-

selves, even to an innocent purchaser? Upon what principle can a void chose in action be rendered valid in the hands of an assignee? How can executors who *prima facie* have nothing to do with real estate, by a simple power of sale contained in the will, accomplish the purpose of divesting the estate of the title to the land by a transaction which is simply an attempt to mortgage it for the personal benefit of one of the executors? This can only be done by giving a broad significance to the purposes of the Recording Act. Upon the record of the title as it stood on the 26th of November, 1894, the plaintiff could see the apparent execution of a deed by the executors to Gans; mortgages for the purchase money given back; a deed from Gans to Anna H. Silverman subject to the mortgages, and the execution by her of a mortgage of $5,000 and one of $15,000 in place of the $20,000 purchase-money mortgages discharged. If he had bought the title to the lands on that day from Anna H. Silverman, without notice of fraud, he could have held that title under the protection given by the Recording Act, and doubtless may be able to so hold the assignment in case the void deed and mortgages back have sufficient life to start the Recording Act into effect, the invalidity not appearing upon the face of the record.

This question seems to have been determined by the Court of Appeals in the case of Benedict v. Arnoux, 154 N. Y. 715. The Court of Appeals, in that case, assumes that the executors executed the conveyance to Arnoux to avoid the terms of the will which gave them no power to mortgage but yet held that as the mortgagee Edwin Booth advanced the amount of the mortgage executed by Arnoux to him, without notice that the sale was for the purpose of enabling Arnoux to mortgage the property, that mortgage was a valid live security in the hands of Booth, and that the knowledge that William H. Arnoux, the mortgagor's brother, who was the agent of the mortgagee, did not bind the principal Booth, as the presumption of the disclosure to the principal did not apply where the agent was acting in fraud of his own principal. The logical sequence of this decision is that a mortgage, executed upon a title derived by fraudulent agreement with the executors under the execution of a power of sale, though void for all other purposes, is enforcible in the hands of an innocent mortgagee.

There are doubtless some circumstances in connection with this title of Anna H. Silverman which might awaken a curiosity as to the nature of the transaction. But the information derived from

the record itself; the joinder of the widow and the other executor in the deed to Gans; the receipt by them of the mortgage from Gans and Anna H. Silverman, together with the affidavits of the executor and the grantee Anna H. Silverman, were sufficient to put the purchaser, from the knowledge and information which he then possessed, at ease, and no circumstances appear in this case sufficient to have compelled a deeper inquiry on his part.

Assuming that, so far as this plaintiff's rights are affected, he has the legal power to declare the mortgage executed by Anna H. Silverman to have had a valid inception, there can be no usury in the transaction by which he gave less than the face; nor can a subsequent extension, even if usurious interest was agreed to be taken, invalidate a security originally perfect.

The usual judgment in foreclosure is directed, with costs.

Judgment of foreclosure directed, with costs.

WILLIAM BACON, Trustee, etc., Plaintiff, *v.* THE ALBANY PERFORATED WRAPPING PAPER CO., Defendant.

(Supreme Court, New York Trial Term, February, 1898.)

Lease — Covenant to repair after a fire — Construction — Surrender.

The true construction of a lease, providing that, if the premises are partially destroyed by fire they shall be repaired "as speedily as possible" by the landlord and that, if the damages are so extensive as to render the premises untenantable, the rent shall cease until they are put in complete repair, while, in case of a total destruction, the rent shall cease altogether, is that, in case of a partial destruction, whether or not it renders the premises untenantable, the landlord shall begin and complete the repairs as speedily as possible; and where he delays necessary repairing for three months, after a fire which has only partially destroyed the premises, but has also rendered them untenantable, the tenant is relieved from further liability by a tender of the keys and an offer to surrender.

ACTION by assignee of lessor on tenant's covenant to pay rent. Defense, that premises were rendered untenable by fire and not put in tenantable condition at the time called for by the lease.

Lord, Day & Lord (Chas. T. Miller, of counsel), for plaintiff.

L. Hotaling (Esek Cowen, of counsel), for defendant.

McAdam, J. The lease demised the premises No. 28 Elm street, New York city, for ten years and six months from November 1, 1890, at $4,000 a year, in monthly payments. On June 14, 1894, a fire occurred, and the building, though not destroyed, was damaged to an extent that rendered it untenantable. The dispute arises under the special covenant of the lease which provides "that, in case the building or buildings erected on these premises hereby leased shall be partially destroyed by fire, the same shall be repaired as speedily as possible at the expense of the party of the first part" (landlord); "that, in case the damages shall be so extensive as to render the building untenantable, the rent shall cease until such time as the building shall be put in complete repair, but in case of the total destruction of the premises by fire or otherwise, the rent shall be paid up to the time of such destruction, and then and from thenceforth the lease shall cease and come to an end," etc. The true construction of the covenant is that the landlord, in case of partial destruction, whether or not the building was made untenantable, was to begin repairs as soon as possible and complete them as speedily as possible. The covenant contains but two clauses — one in regard to total destruction, which was to terminate the lease; the other in regard to partial injuries, in which case the premises were to be restored by the landlord to their former condition. In this respect the case differs essentially from Witty v. Matthews, 52 N. Y. 512, in which the covenant contained three independent clauses, the one relating to speedy repairs applying only to injuries not rendering the premises untenantable; whereas in this instance the covenant applies whether the premises were rendered untenantable or not. The obligation to pay rent ceased under the special covenant here when the building became untenantable, subject to revival only in case the repairs were made by the landlord "as speedily as possible;" for this was a condition precedent to such revival. The rule is that a condition precedent (not waived by the party in whose favor it is made) must be literally observed by the party who is to perform the promise, and if he fail to perform, the other party is discharged. 3 Am. & Eng. Enc. of L. 911, 914; Higgins v. Delaware, L. & W. R. R. Co., 60 N. Y. 553; Koerner v. Henn, 8 App. Div. 602. Any other construction would compel the tenant to resume possession at an unknown and indeterminable period, measured only by the pleasure of the landlord; which was evidently not the intention of the con-

tracting parties. The words "as speedily as possible" mean within a reasonable time, or without unreasonable delay. Atwood v. Emery, 1 C. B. (N. S.) 110; 2 Pars. Cont. (6th ed.) 497, 498; 1 Chitty Cont. (11th Am. ed.) 116. The parties having by express covenant provided for the contingency of fire, it furnishes the measure of the defendant's liability, and the statute (Laws of 1860, chap. 345) has no application. Tocci v. Powell, 9 App. Div. 283; Butler v. Kidder, 87 N. Y. 98. At common law the defendant's liability would have continued, notwithstanding the fire (3 Kent's Com. 465; Taylor's L. & T., § 375; Bloomer v. Merrill, 1 Daly, 485; Jackson v. Suydam, 54 N. Y. 450), and as the statute does not relieve the defendant, its rights and duties must be determined solely by the special covenant. *Modus et conventio vincunt legem.* Although the complaint alleges that the repairs were made "as speedily as possible," the plaintiff failed to prove this allegation, taking the position at the trial that he had the right to take as much time as he chose to make the repairs, the only consequence being that until the repairs were completed the defendant had the use of the land free of rent. This construction of the covenant cannot prevail. If the defendant was to continue as tenant of the premises after they had been made untenantable by fire, it was certainly a reasonable requirement that they should be put in tenantable condition as soon as reparation could reasonably be made. The covenant evidently contemplated some duty and diligence on the part of the landlord. The defendant sublet the building in tenements and the last subtenant vacated his rooms early in September, 1894. The premises being then entirely abandoned, the defendant on the 12th of that month (three months after the fire) made a tender of the keys, and offered to surrender the premises in rescission of the hiring. As the condition precedent upon which the lease was to continue had, at the time of such offer to surrender, not been performed, no diligence having been used by the landlord in making the necessary repairs, the tenant had the right to, and did, terminate its liability by the offer. It follows that there must be judgment for the defendant.

Judgment for defendant.

HENRY OFSCHLAGER, Plaintiff, *v.* JOHN G. SURBECK, Defendant.

(Supreme Court, Onondaga Trial Term, February, 1898.)

Malicious prosecution — Want of probable cause — Status of plaintiff's husband, whether servant or tenant.

Where the proof, in an action for malicious prosecution, tends to show that the assault for which the defendant caused the plaintiff's arrest consisted, as she alleges, in her resistance to his entrance upon premises of which she and her husband claimed to be his tenants, and the testimony upon that question shows that the defendant had deducted from the wages of the husband, who was also in his service, moneys for rent, and had, in two affidavits used in judicial proceedings, stated, in one case, that he had rented the premises to both husband and wife and, in the other case, that he had rented them to the husband, the question whether the husband was servant or tenant is properly left to the jury.

MOTION by defendant upon the minutes to set aside a verdict rendered in behalf of the plaintiff and for a new trial.

William Nottingham, for motion.

Walter W. Magee, opposed.

HISCOCK, J. This action was brought to recover damages for an alleged malicious prosecution. The defendant caused the arrest of plaintiff upon the charge of assault in the third degree. She was tried and acquitted and this action brought. The important question herein whether defendant had probable cause for instituting said criminal proceedings is largely dependent upon the character of the occupation had by plaintiff and her husband of a certain house belonging to defendant. For concededly, upon the occasion complained of by defendant in his criminal proceedings, plaintiff did commit upon defendant what, without justification, would be an assault. She claims, and the jury had a right to find as it did, that she did whatever was done by her upon that occasion to prevent defendant from entering the house occupied by her husband and herself, and she further claims that she had a right to do so because they were in possession of said house as tenants. The defendant, upon the other hand, claims that her husband was in occupancy simply as a hired man and that defendant had re-

tained possession of the premises and, therefore, had a right to enter, as he was attempting to do, and that there was nothing to justify plaintiff's acts or to relieve them from the character of an assault such as was charged in his criminal proceedings.

Upon the trial it was left to the jury to determine as a question of fact whether the occupancy of plaintiff's husband was that of tenant or of a mere hired man. It is insisted by defendant that this was error and that the court should have held as matter of law that the occupancy was of the latter character. Consideration of the evidence at length upon this motion, however, convinces me that the disposition made upon the trial was correct and was as favorable to defendant as he could ask.

Defendant was the owner of a farm of about forty-five acres upon which there was the house in question. January 6, 1893, a written memorandum was made and signed by defendant and plaintiff's husband which, amongst other things, provided as follows: "The above-named William Ofschlager agrees to work for J. G. Surbeck on his farm * * * from March 1, 1893, to March 1, 1894, and to faithfully perform the duties assigned to him and keep the part of the house occupied by him and his family in good order. In return J. G. Surbeck agrees to pay William Ofschlager as follows: Twenty-six dollars per month for the first eight months, $208. Twenty dollars per month for the following four months, $80. In addition to the above, house rent at $10 per month, $120," etc. So far as the question under discussion is concerned, plaintiff's husband seems to have entered into and continued in the occupation of the house in question under the above agreement until shortly before the month of March, 1896, when the alleged assault of plaintiff upon defendant took place, and as Ofschlager swears each month $10 was deducted by defendant from his wages for the house. The defendant testifies that in February of that year he refused to extend said agreement for another year, but made a new parol agreement. The details of such agreement are very meagerly stated in the evidence. The defendant says he told plaintiff's husband that after the 1st of March he could only stay there from "day to day." Plaintiff's husband swears that defendant deducted $10 from his wages for the said month of March for rent of house and defendant testified upon the subject as follows:

"Q. How much was paid by Mr. Ofschlager for the month of March, 1896, when you settled with him; how much did he pay for the house?

"A. There was nothing said about paying for the house.

"Q. Didn't he pay the usual $10 for the month of March?

"A. No sir, he never paid it; we allowed so much, the same as we had done.

"Q. So that $10 was paid by him for this month of March, 1896?

"Objected to.

"The Court.— Was allowed."

In addition, certain declarations of defendant in regard to this last arrangement were proved. In an affidavit filed upon which to procure a warrant against plaintiff he swore that upon the occasion of the alleged assault he "Attempted to gain access to a portion of said house (in question) which this deponent had reserved for his own use, having let and rented the other portion to the defendant and her husband." And subsequently he presented a petition for the removal of plaintiff's husband as a tenant holding over from the premises in question, and in which petition, so made by him, was amongst other things the following allegation: "That on or about the fore part of February, 1896, your petitioner above named as landlord let and rented said real property, house and premises unto William Ofschlager for the term of one month from the 1st day of March, 1896, which said term has expired." There was no evidence aside from that of the general situation to indicate that the occupation by plaintiff's husband of the house in question was connected with or necessary to the performance of the services which he was hired to perform, or that such occupation was required for the necessary or better performance of the services which he was to perform.

If the rights of the parties were to be determined solely by reference to the written agreement heretore quoted from, I should hesitate to decide as matter of law that Ofschlager's occupancy was simply that of a hired man.

Where a person lawfully enters upon premises as a place of abode and occupies them as such the presumption is that such occupancy gives possession thereof to him and does not leave such possession in another, as in this case, the defendant, and any less right than that which possession furnishes is dependent upon some understanding, express or implied, denying such relation. Bristor v. Burr, 120 N. Y. 427, 433.

The mere fact that the relation of master and servant existed does not preclude the creation and existence of the other relation

of landlord and tenant. It does not seem to me that the occupation of this particular house was so essential to the performance of the services to be rendered by plaintiff's husband, or that it was so much more conducive to that purpose than any other house which he might have paid for, as to settle this question in favor of defendant. But farther than that, the memorandum of hiring in treating of this subject expressly provides that the person occupying the house is to keep it "in good order," and that the house rent is to be $10 per month, which rent, it is testified, was deducted from month to month from the wages paid. These latter provisions are all incidents of a lease rather than of a mere occupancy as a hired man. The allowance or deduction from wages of a specified sum as *rent* for the use of premises is always a material circumstance to prove the existence of a lease in such case. McGee v. Gibson, 1 B. Monroe, 105; cited, 6 Lans. 184; Kerrains v. People, 60 N. Y. 221-226, 227; People v. Annis, 45 Barb. 304, 306; Doyle v. Gibbs, 6 Lans. 108, 182.

Upon the facts above stated the case seems to be one of a tenancy within the principles laid down in Hughes v. Chatham, 5 M. & G. 54, and cited with approval in Kerrains v. People, *supra*. The facts in that case were that a master ropemaker in a royal dockyard had, as such, a house in the dockyard for his residence, of which he had the exclusive use, without paying rent, as part remuneration for his services, no part of it being used for public purposes. If he had not had it, he would have had an allowance for a house in addition to his salary. It was held that the ropemaker occupied as a tenant and not as a servant, and the court said: "There is no inconsistency in the relation of master and servant with that of landlord and tenant. The master may pay his servant by conferring upon him an interest in real property, either in fee, for years or at will, or for any other estate or interest, and if he do so the servant then becomes entitled to the legal incidents of the estate as much as if it were purchased for any other consideration. * * * And as there is nothing in the facts stated to show that the claimant was required to occupy the house for the performance of his services, or did occupy in order to their performance, or that it was conducive to that purpose more than any house which he might have paid for in any other way than by his services, and as the case expressly finds that he had the house as part remuneration for his services, we cannot say that the conclusion at which the revising barrister has arrived is wrong."

In this case, however, at the time when the occurrences in question took place there is evidence that the original memorandum had ceased to govern, and that a new arrangement had been made between defendant and his hired man. The details of that arrangement as described are more or less indecisive. But it does appear that defendant had received $10 for the occupation of the premises deducted or allowed from the wages which he paid to plaintiff's husband, and he himself, upon various occasions, swore, in substance, that this new arrangement was a lease, for the month of March. Under these last circumstances it certainly cannot be said that the evidence proved beyond any question an occupancy as a hired man and that there was nothing to indicate a lease and no evidence from which upon that subject conflicting inferences might not be drawn. If there was any evidence which tended to support the theory of a lease or which permitted different inferences it was proper to submit to the jury to find what were the actual relations with reference to this house between the parties. Kerrains v. People, *supra;* Wood's Law of Master and Servant (2d ed.), p. 306; State v. Hayes, 59 N. H. 450; Handford v. People, 7 Week. Dig. 528.

It was also urged upon this motion that the verdict was excessive. It was undoubtedly liberal but I do not think that it can be said that it was so large as to come within the rules applicable to setting aside verdicts as excessive.

The motion for a new trial, therefore, is denied, with $10 costs.

Motion denied, with $10 costs.

THE FIRST NATIONAL BANK OF SARATOGA SPRINGS, Plaintiff, *v.* THE ROCK CITY FALLS PAPER CO., Defendant.

(Supreme Court, Saratoga Special Term, February, 1898.)

Domestic assignment by insolvent foreign corporation — Conflict of laws — Estoppel.

Where a corporation, incorporated in a foreign state, where an insolvent corporation is forbidden to make any assignment of its property, carries on business and subsequently makes a general assignment in the state of New York, containing no preferences other than those to employees, a creditor, resident in this state, and which is

also the depositary of the funds of the general assignee, is, after the making of a final decree to which it was a party, and under which it would receive a distributive share, estopped from bringing an action, in order to levy by attachment upon the funds of the general assignee, upon the theory that the assignment in this state is void because it conflicts with the laws of the foreign state relative to assignments by insolvent corporations.

MOTION by an assignee for the benefit of creditors to set aside an attachment.

W. D. McNulty, for plaintiff.

E. T. Brackett, for assignee.

RUSSELL, J. The defendant is a manufacturing company organized under the laws of the State of New Jersey which prohibit an insolvent corporation from making any assignment of its property. Its industrial business was carried on in the state of New York, which was permitted by the laws of New Jersey. Becoming insolvent, defendant made a general assignment without preference, except to employees in pursuance of the laws of the state of New York. The plaintiff was a party to the proceedings under the assignment, both as creditor and depositary of the funds of the assignee. The proceedings under the assignment went to a general accounting and a decree dividing the proceeds. By that decree the plaintiff was entitled to a distributive share. Thereafter the plaintiff brought this action and levied by attachment upon the cash in the hands of the assignee under the legal theory that the assignment was in conflict of the laws of the state of New Jersey, which created the corporation and, therefore, void. This motion is now made by the assignee to set aside the attachment, and allow the distribution of the funds as directed by the decree of the County Court of Saratoga county.

There is no doubt that the assignment would be void under the laws of the state of New Jersey so far as those laws have valid operation. In the conflict of laws between two states the disposition of the property of the insolvent, as a matter *in rem*, is generally guided by the rules of municipal policy as to the proper division of the property of insolvents within the jurisdiction of the forum in which the controversy lies.

Where both the property was acquired by the corporation and the liabilities created by it within that forum, the general rules of public policy, adopted for the best interests of the citizens of the state, should apply rather than mere questions of state comity; and it is a serious question whether one state can create an artificial being, with permission to make contracts and deal in property in another state and yet withhold from the other state the power to dispose of that property among the creditors in the way which seems to it just. It would be confessedly within the power of the state of New York by general law to devote such property to the payment of creditors, irrespective of any provisions of the laws of the state to which it owed simply its formal existence; and, even if the grasp of the courts of this state upon the property was secured by voluntary action of the corporation itself, forbidden by the laws of the state of New Jersey, still the general laws of the state of New York may accept the imperfect action as a cause of distribution, as in case of insolvency, and so administer the estate.

These views arise from the situation of this case, uncomplicated by any action of the plaintiff. That action, however, has an important bearing upon the question to be solved. The plaintiff was duly made a party to the proceeding in the County Court and should be bound by its decree of distribution. No protest in that proceeding was taken by the plaintiff, and its validity was affirmed by the acceptance of the position of depositary of the trust funds. The decree of the county judge was final as to every conclusion embraced within the power incidental to the performance of the duties imposed upon that court. It was one of the necessary duties of that court to say how the proceeds should be divided, and to what share the plaintiff should be entitled. Jurisdiction of the persons of the creditors was gained by that court and the estoppel applies as forcibly under the circumstances of this case as though the plaintiff had accepted the dividend awarded, and then sought by attachment to take away the remainder left to its companion creditors.

The motion to vacate the attachment is granted, with costs.

Motion granted, with costs.

ISAAC C. DAVIS, Appellant, *v.* CARL F. KALLFELZ, Respondent.

(County Court, Onondaga County, February, 1898.)

1. **Negligence — Collision in a street — Contributory negligence by leaving a buggy unattended in the street, contrary to an ordinance.**

Where it appears, upon the trial of an action, to recover damages for injuries alleged to have been caused by the running away of the defendant's team, left unattended in a city street, and its collision with the buggy of the plaintiff, that, contrary to a municipal ordinance forbidding, under a penalty, "any detached vehicle to remain in any public street," the buggy of the plaintiff had, before the collision, stood in such a street for more than four hours, a justice of the Municipal Court of the city of Syracuse may properly find as a fact that the plaintiff has been guilty of such contributory negligence as precludes his recovery.

2. **Same — A horse left unattended in a street — Res ipsa loquitur.**

The fact, that a horse, left unattended by the defendant in a public street, ran away, calls for explanation, and, when unexplained, would have called for a reversal of the judgment in his favor, had the plaintiff been free from contributory negligence.

APPEAL from a judgment of the Municipal Court of the city of Syracuse in favor of defendant.

Action to recover damages caused by defendant's negligence. Answer, denial and contributory negligence.

Goodelle & Nottingham, for appellant.

Hopkins & Bondy, for respondent.

Ross, J. Appeal from a judgment of the Municipal Court of the city of Syracuse in favor of the defendant for $9.70 costs. The return of the justice contains this entry: "Plaintiff left his wagon in the street from six o'clock until ten o'clock a. m., in violation of the city's charter, which was a wrongful act and prevents him from recovering" and signed by the judge of the Municipal Court below who tried the case.

The evidence, in brief, shows that during the temporary absence of the defendant's driver a team belonging to the defendant

ran away and collided with a buggy belonging to the plaintiff, which at the time was standing between the curb and the sidewalk upon a public street in the city of Syracuse. This action is brought to recover damages for such injuries. The plaintiff claims that the facts developed upon the trial, *i. e.*, the fact that the team was left unattended, that it ran away, and that the driver when placed upon the stand by the defendant was not questioned as to his management of the team at the time (Milliman v. R. R. Co., 3 App. Div. 110), makes it a *prima facie* case of negligence, calling upon the defendant to make some explanation of his conduct. The defendant called no witnesses who gave any explanation as to how the accident occurred or showed that it was from fright, or from causes for which the defendant was blameless or against which he had taken proper precaution.

Contrary to my impression upon the argument, I am convinced that this contention is correct and that the fact that a horse is left unattended in the public street and in fact runs away, is evidence of negligence which requires a decision in accordance with such a conclusion if not explained. Pearl v. Macaulay, 6 App. Div. 70; Doherty v. Sweetser, 82 Hun, 556; Norris v. Kohler, 41 N. Y. 42, 46, and cases; Unger v. F. S. S. R. Co., 51 id. 498.

In so far as the judgment is a determination of the defendant's negligence, this is not a decision of a justice of the peace upon conflicting evidence or upon evidence from which different inferences can be drawn and, therefore, final upon appeal. Hommel v. Meserole, 18 App. Div. 106. Therefore, the judgment must be reversed unless there is evidence to sustain the finding of the justice that the plaintiff was guilty of contributory negligence.

Section 6, chapter 40 of the ordinances of the city of Syracuse (offered in evidence by the defendant), provides the punishment for leaving a detached vehicle in a public street: "Who shall permit any detached vehicle to remain in any public street" shall be, etc. No time is specified as being necessary to bring a person within the terms of this ordinance. At the time of the happening of the accident and for four or five hours prior thereto the vehicle in question stood within the confines of a public street in the city of Syracuse, but not in the roadway, being situated between the curb and the sidewalk.

It is earnestly contended by the plaintiff that this fact does not, as a matter of law, constitute the proximate cause of the plaintiff's

injury and that it should be held as a matter of law that it is no defense to this action. The defendant contends with equal earnestness that the state of facts developed upon the trial in relation thereto, showing an unlawful act and creating as is claimed by the defendant, a nuisance, prevents, as a matter of law, a recovery by the plaintiff; and this was the view apparently taken in the mental operation of the justice in deciding the case; but the mental operation of the justice in deciding the case has nothing to do with the record. It is not made by statute a part of the record and could not be offered in evidence upon a question whether a decision rendered embraced issues presented within a subsequent decision. Agan v. Hey, 30 Hun, 591.

The commission of an unlawful or a prohibited act by the plaintiff, in an action of negligence does not necessarily prevent a recovery. Davies v. Mann, 10 M. & W. 546, the case of a donkey fettered in a highway; Platz v. City of Cohoes, 89 N. Y. 219. In this case the plaintiff was injured while traveling in violation of the statute relative to the observance of Sunday. Also Carroll v. S. I. R. R. Co., 58 N. Y. 126; Connolly v. Knickerbocker Ice Co., 114 id. 104. In the case last cited the plaintiff, an infant, was injured by a collision between a street car on which he was riding and a wagon belonging to the defendant. The plaintiff was at the time riding upon the platform of a street car. It was held:

(a) That while such act (*i. e.*, riding on the platform) might be a defense in an action against the railroad company, it could not be asserted by a third party.

(b) The plaintiff was riding upon the platform in violation of a statute. "While the violation of such statute may be proved as a fact for consideration by the jury, such violation does not for all purposes necessarily establish negligence * * * the getting upon the car was not the immediate cause of the plaintiff's injury, and assuming that the plaintiff violated the statute, he was not for that reason denied the right to assert the defendant's negligence as the cause of the injury and charge the defendant with liability as the consequence." Knupfle v. Knickerbocker Ice, Co., 84 N. Y. 488, in which it was held that the proof of the violation of a city ordinance does not establish negligence *per se*, but is some evidence for the consideration of the jury.

The question of contributory negligence may be disposed of by the court when no facts are in dispute or no weighing of testimony is necessary. Sherry v. N. Y. C. & H. R. R. R. Co., 104

N. Y. 652. In Thurber v. H. B. M. & F. R. R. Co., 60 N. Y. 331, it is held in the opinion of Mr. Judge Allen: "When the inferences to be drawn from the proof are not certain and incontrovertible it cannot be decided as a question of law by directing a verdict or nonsuit, but must be submitted to the jury." Atwater v. Town of Veteran, 6 N. Y. Supp. 907.

That the violation of a statute or ordinance is evidence for the consideration of a jury upon the question of negligence, see Knupfle v. Knickerbocker Ice Co., 84 N. Y. 488, and McRickard v. Flint, 114 id. 222. In the last case it is held that the omission of the owner of a building in the city of New York to comply with certain statutory requirements in regard to protecting the openings in the different floors is *prima facie* evidence of negligence. Blanchard v. N. J. S. Co., 59 N. Y. 292, and Hoffman v. Union F. Co., 68 id. 385, hold that the failure of an injured vessel to comply with statutory regulations is not *per se* a bar to a recovery, but is one of the circumstances to be considered in ascertaining the proximate cause of the injury.

The attorney for the appellant cites in his supplemental brief a number of cases: Platz v. City of Cohoes, 89 N. Y. 219; Davies v. Mann, 10 M. & W. 546; Williams v. Syracuse Iron Works, 31 Hun, 392; McKeon v. Steinway R. R. Co., 20 App. Div. 601; Halley v. Earle, 30 N. Y. 208, and Austin v. N. J. Stmbt. Co., 43 N. Y. 75. He claims that these cases hold that the violation of a statute or ordinance or other unlawful act alleged in these respective cases does not, as a matter of law, constitute contributory negligence.

The cases of Davies v. Mann and McKeon v. Steinway R. R. Co. have to do with the interesting question, constantly growing in importance, of the distinction relative to an antecedent negligence which might not be concurrent in such a sense as to relieve the defendant from liability; (and in both of these cases the act alleged as contributory negligence was not the violation of any statute or rule or ordinance;) and decide that when the plaintiff has placed himself in a dangerous position, the defendant, advised of his situation, is not, for that reason, legally justified in injuring him.

In Austin v. Steamboat Co., Church, Ch. J., said "The referee before whom this action was tried, found as a conclusion of fact that the injury complained of was caused by the negligence of the defendant, and that the plaintiff was free from any negligence which contributed to the injury, and this court is concluded by these findings."

In Haley v. Earle, Ingraham, J., said: "The only question in this case is whether the judge erred in submitting to the jury the question whether the want of a helmsman on board of the barge contributed to the accident, and if not, that that fact did not prevent the plaintiff's recovery."

In Williams v. Syracuse Iron Works, it was held to be error not to submit to the jury as a question of fact whether, under the circumstances of that case, the plaintiff's intestate was guilty of contributory negligence. In other words, it is held in the cases referred to that the question of the contributory negligence of the plaintiff is a question of fact and they do not hold that the acts of the plaintiff did not constitute contributory negligence.

In this case it is claimed that the plaintiff had violated an ordinance of the city of Syracuse. This is a circumstance for a jury to consider under the cases above cited. The location of the detached vehicle with reference to the roadway, the length of time it had remained in that situation and all the circumstances connected therewith, present facts from which different men might draw different inferences. Therefore, the justice's decision of these issues in favor of the defendant will not be disturbed upon appeal. The verdict of a jury settles in favor of the prevailing party every question of fact litigated upon the trial. Wolf v. G. F. I. Co., 43 Barb. 400.

In Burnham v. Butler, 31 N. Y. 480, Mr. Justice Potter states the rule laid down by Bronson, J., in Stryker v. Bergin, 15 Wend. 491, to be: "That where on a trial in a Justice's Court there is evidence on both sides, and even where there is only slight evidence in support of the cause of action on which there is a recovery, the County Court is not authorized to reverse the judgment, although such court may arrive at a conclusion upon the facts of the case, or the weight of evidence, different from that drawn by the justice." This is equally applicable in a case where different inferences can be drawn from a conceded state of facts.

If it is desired by the attorneys or by the court below to present a decision as a question of law it should be done by granting or refusing an application to nonsuit.

For the reasons heretofore stated the judgment is affirmed, with costs.

Judgment affirmed, with costs.

Misc.] County Court, Onondaga County, February, 1898.

THE PEOPLE ex rel. HENRY HUNT, Relator, *v.* JOHN S. MARKELL, Defendant.

(County Court, Onondaga County, February, 1898.)

Crimes — Certificate of conviction.

A certificate of conviction which, among other things, states the commission of the offense, its date, and its nature, by the statement that the accused was, before the city recorder, "charged with petit larceny" in said city, is sufficient, under the Code of Criminal Procedure, § 721, although it fails to state the property taken or the person from whom it was taken.

THE relator procured a writ of *habeas corpus*, and the defendant, upon the hearing, filed a return that he held the defendant pursuant to a certificate of conviction of which the following (omitting the formal parts) is a copy:

"Whereas, at a Court of Special Sessions holden before me, the undersigned, Charles Carmichael, recorder of the City of Rome, in said city on that day (*i. e.*, September 29, 1897) the above-named defendant was before said recorder charged with petit larceny in said city on the 25th day of September, 1897, and he having thereupon pleaded guilty to said charge and failed to demand a jury, and having been duly tried upon said plea, and upon such trial having been duly convicted, it is adjudged, that he be imprisoned in the Onondaga County Penitentiary for six months. Dated September 29, 1897. Charles Carmichael, Recorder of the City of Rome."

Rubin & Tierney, for relator.

George T. Davis, assistant district attorney of Oneida county, for defendant.

Ross, J. It is claimed by the relator's attorneys that the certificate of conviction is insufficient in that with other things it does not state the person from whom the property was taken, and also fails to specify the articles stolen.

Section 721 of the Code of Criminal Procedure, requires that a certificate of conviction of a Court of Special Sessions must be substantially in the form set forth in that section, and requires with other things that it briefly designate the offense. Such

designation requires such certainty that a jury may deliver an intelligent verdict, that the law may render a proper judgment, and that the defendant may plead the judgment in bar of any other prosecution for the same offense. People v. Taylor, 3 Den. 91; People v. Stocking, 50 Barb. 573, 586; People v. Olmsted, 56 N. Y. St. Repr. 311; Matter of Brown, 19 Misc. Rep. 692; People ex rel. Snyder v. Whitney, 22 id. 226.

The relator's attorneys rely upon the Brown case decided by Mr. Justice Hiscock. The certificate of conviction in that case was very loosely drawn; and with other objections raised by the attorneys for the relator that it did not state the date of the offense, nor was it in any manner indicated. The learned justice discharged the relator upon the ground of the failure to specify the date of the offense. The statement of the learned justice of the other facts in the case, shows the greater necessity for a specific statement of the date. That case only decides that "the date of an offense is one of the essential particulars of the description thereof required to be inserted in such a certificate." In this case the place of the commission of the offense and the date are both set forth: "The above-named defendant was before said recorder charged with petit larceny in said city on the 25th day of September, 1897." I think, while the specification of the offense might well be more specific, that sufficient appears to give the recorder jurisdiction of the person and of the offense. Bennac v. People, 4 Barb. 31; Case of Twelve Commitments, 19 Abb. Pr. 394,401; People v. Johnson, 46 Hun, 668; affirmed, 110 N. Y. 134; People v. West, 106 id. 293; People v. King, 110 id. 418.

The principal difficulty in cases of this character, in which the certificate of conviction is somewhat vague, is whether the offense is described with that degree of certainty that the defendant may plead the judgment in bar of another prosecution for the same offense.

I think the difficulty in this case, in respect to proving, upon a possible subsequent trial for the same offense, this conviction, is purely imaginary. The test laid down by Mr. Bishop is as follows: "Whether if that which is set out in a second indictment had been proved under the first there could have been a conviction; when there could, the second cannot be maintained: when there could not, it can be." 1 Bish. Cr. Law (8th ed.), § 1052, subd. 2. Where a defendant relies upon an adjudication of the matters in controversy in a former suit, he is not confined to the

record alone, but may show by extrinsic proof what particular matters were litigated, provided the matters sought to be shown were within the issues tried. Rake v. Pope, 7 Ala. 161; Williams v. State, 13 Tex. App. 285, 288; Commonwealth v. Sutherland, 109 Mass. 342.

The plea of a former acquittal or conviction is a plea of a mixed nature, consisting partly of matters of record and partly of matters of fact. The matters of fact are the averment of the identity of the offense and of the person, and evidence is admissible to show that, in fact, the crimes are the same. Clem v. State, 42 Ind. 420, 423; State v. Maxwell, 51 Iowa, 314; People v. Cramer, 5 Park. Crim. 171, 178; Abbott's Trial Brief Criminal Cases, § 572, and cases there cited; Freeman on Judgments, § 273. The plea of a former conviction is a good plea in bar, however irregular the proceedings before the justice may have been. State v. George, 53 Ind. 434; Brinkman v. State, 57 id. 76. The last case cited holds that the defendant is entitled to an acquittal upon the ground of a former acquittal or conviction, if he shows his case has been previously submitted to a court or jury that might have convicted or acquitted him. Bryant v. State, 72 Ind. 400. The pleas of a former acquittal or a former conviction are favored pleas in this country. Baysinger v. State, 77 Ala. 60.

The only question, upon the return of a writ of *habeas corpus* to inquire the cause of imprisonment of one detained under an apparently valid legal process, is whether the court has jurisdiction to try the relator. The merits of the conviction are not open for review. People ex rel. Tweed v. Liscomb, 60 N. Y. 570; People ex rel. Catlin v. Neilson, 16 Hun, 214; People ex rel. Forbes v. Markell, 92 id. 286.

For the reasons heretofore given the relator must be remanded and the writ discharged.

Relator remanded and the writ discharged.

Matter of the Application of WILLIAM WALSH *v.* WILLIAM F. RICHARDS, as County Treasurer of Oneida County.

(County Court, Oneida County, February, 1898.)

1. **Taxation — Taxes received from a railroad must be applied to town bonds issued in its aid — Insufficient defenses.**

The provisions of the Municipal Law (Laws of 1892, chap. 685, § 12) absolutely compel a county treasurer to apply taxes, which have been received by him and by his predecessors from the property of a railroad situate in a town, to the purchase of town bonds which have been issued in aid of its construction or to the creation of a sinking fund in the manner prescribed by statute; and an application by a taxpayer of the town, to compel such action upon the part of a county treasurer, cannot be successfully resisted by an answer which alleges that the granting of the application will necessitate a new apportionment sheet which cannot be made and filed within the time required by law; that the county treasurer, upon his entry in office, found no such sinking fund; that the town has not paid over to him the proportion of its taxes proper for the purposes of the application; that no such claim upon him has ever been made before, and that he has no funds for the purpose sought.

2. **Same — Presumption that the county treasurer has funds.**

Where the accounts of a county treasurer's office show that, during a period of five years, the balance of the general fund has exceeded the amount paid by the railroad company for town taxes, a presumption arises that the fund is still in the hands of the county treasurer and hence it must be applied as the statute directs.

APPLICATION pursuant to section 12 of the Municipal Law, to compel the county treasurer of Oneida county to apply so much of the taxes received by him and his predecessors collected on the assessed valuation of the Utica, Chenango & Susquehanna Valley R. R. Co. and its successor, the D., L. & W. R. R. Co., in the town of Bridgewater, as shall be necessary to take up certain bonds, issued by said town to aid in the construction of said railroad, and in the purchase of such bonds or in the purchase of such other bonds, authorized by said act, as may be necessary to create a sinking fund for the redemption and payment of said town bonds.

The petition alleges that from 1891 to 1896, inclusive, the board of supervisors levied taxes on the lands of said railroad company in said town to the amount of $2,578.10, which were paid by said

company. That the bonds issued by said town to aid in the construction of said railroad are outstanding to the amount of at least $1,500, and interest from March, 1890. That taxes so levied and paid by said company have been paid to said county treasurer and his successor to an amount exceeding said sum of $1,500 and interest as aforesaid, and exclusive of school district and highway taxes. That said taxes or moneys, so levied upon and paid by said railroads upon their lands in said town, have not been used in the purchase of such bonds, or any of them, or invested in any way as a sinking fund, but have been used and paid out in the regular course of business upon the debts, charges and claims due from the county to its general creditors.

The answer contains no denial of any allegation of the petition, but expressly admits such as are matters of public record, and by way of avoidance alleges that, since the service of the order to show cause herein, the board of supervisors have determined the amount of taxes to be levied and fixed the ratio and apportionment. That in many instances the taxes have been extended and that granting the prayer of the petition would prolong the session of the board and work great hardship upon the members. That thereby a new apportionment sheet would be made necessary and that the time fixed by law to file the apportionment sheet in the county treasurer's office is December 20, 1897. That said work could not be accomplished by that time and a failure to comply with the law in that respect might invalidate the entire tax levy. The answer further alleges that when the present county treasurer entered upon the duties of his office he found no "railroad sinking fund" upon the books of said office; that the town of Bridgewater and its supervisor and collector of taxes have failed to comply with the provisions of the act under which relief is sought, in that they failed to turn over their proper proportion of said taxes. The answer further alleges that no proper claim has been made upon the county treasurer in any of said years or while said moneys were in his possession, and that the only claim ever made upon him has been made within a few days and too late for any adequate remedy. That none of said funds are now in the county treasurer's hands.

The answer further alleges that several other towns are similarly situated and that they could ask for similar relief upon like notice and thus indefinitely prolong the session of the board of supervisors.

Upon the argument the attorneys for the parties stipulated that

the journals of the board of supervisors of Oneida county for the years 1888 to 1896, inclusive, be deemed in evidence in this proceeding.

Geo. C. Morehouse, for petitioner.

J. K. O'Connor, opposed.

DUNMORE, J. This application is made under section 12 of the Municipal Law (Banks' 9th ed., Vol. 1, p. 585). That part of which is material to this application reads as follows:

"If a town, village or city has outstanding unpaid bonds, issued, or substituted for bonds issued, to aid in the construction of a railroad therein, so much of all taxes as shall be necessary to take up such bonds, except school district and highway taxes, collected on the assessed valuation of such railroad in such municipal corporation, shall be paid over to the treasurer of the county in which the municipal corporation is located. Such treasurer shall purchase with such moneys of any town, village or city, such bonds, when they can be purchased at or below par, and shall immediately cancel them in the presence of the county judge. If such bonds cannot be purchased at or below par, such treasurer shall invest such money in the bonds of the United States, of the state of New York, or of any town or village or city of such state, issued pursuant to law; and shall hold such bonds as a sinking fund for the redemption and payment of such outstanding railroad aid bonds. If a county treasurer shall unreasonably neglect to comply with this section, any taxpayer of the town, village or city having so issued its bonds may apply to the county judge of the county in which such municipal corporation is situated, for an order compelling such treasurer to execute the provisions of this section."

This act has been frequently construed by the courts and the objections raised by the answer are I think covered by the decision in Matter of Clark v. Sheldon, 106 N. Y. 104, in which the court said: "It is no answer for the treasurer to say that if he should set aside these taxes for a sinking fund, there would be a deficiency in other funds, and that he may not have money enough to pay the obligations of the county to the state and to the county officials and county creditors. He has no right to use the money, produced by these taxes, to discharge any of these obliga-

tions. The law has appropriated it for a specific purpose, and it is his duty to apply it to that purpose."

Upon the second appeal of the same case to the Court of Appeals (134 N. Y. 333), it was held that "all taxes except school and road taxes collected in any town on the assessed valuation of any railroad for which said town has issued or shall issue bonds, shall be paid over to the treasurer of the county in which said town lies. And it is made the duty of the treasurer with such taxes to purchase the bonds of said town, or to otherwise invest the same and hold the investment as a sinking fund for the ultimate redemption and payment of said bonds. In case any county treasurer shall unreasonably refuse or neglect to comply with the provisions of the act, any taxpayer of the town is authorized to apply by petition to the county judge for an order compelling said treasurer to execute the law, and it is made the duty of the county judge in a proper case to grant such an order. It is plain that neither the town, or the county within which it lies, nor any officer or citizen thereof, have any power or authority over the disposition of the taxes mentioned in the act that come into the treasurer's hands. The county treasurer in his relation to these taxes is not the agent of the county or the town. The supervisors have no jurisdiction over the fund, and cannot legislate concerning it nor direct or control the action of the county treasurer with reference to it. Neither can the town through its officers or its town meeting change the direction of the fund, or cause it to be applied to any purpose except that named in the law, and any taxpayer has a right as against the town and all other taxpayers therein to have the fund applied to the purposes stated and to institute proceedings to that end. If at the commencement of such proceedings such taxes are in the hands of the county treasurer, no power exists to relieve him from the performance of the duty devolved upon him except in the legislature of the state, and consequently it cannot be a defense for him to say that he has paid the taxes over to any officer of the town or that the town has had the benefit of it in its application to town purposes."

The case of Spaulding v. Arnold, 125 N. Y. 194, was a similar proceeding against the county treasurer of Niagara county. Nine years' taxes were involved. It appeared that at all times during the nine years the balance remaining in the general funds in the county treasurer's hands had exceeded the amount of the railroad taxes in question.

The Court of Appeals held that as the balance of money in the county treasurer's hands at all times exceeded the amount of railroad taxes involved, the presumption was that said railroad taxes were still in the county treasurer's hands. "Certainly," the court says, "we never should indulge in the presumption, without proof, that the moneys have in fact been used for some purpose other than that commanded by the statute. To use the moneys for any other purpose would be to misappropriate them, and proof of such misappropriation would have to be made before the fact could be found. * * * We think as the evidence stands, it is entirely proper to assume that the general fund contains these moneys. * * * The funds thus paid into the county treasury having remained therein from the time of such payments up to the present moment, there has been a continuing duty resting upon the county treasurer to make the application provided for by the statute, and this duty continues up to the moment he discharges it by making the application which the statute commands. * * * It is not necessary that the particular moneys paid by the railroad company should be identified. * * * Here the county treasurer has been paid certain sums of money which he has not used, and which are still subject to his disposal in a legal and proper manner. The court, under the statute, may make an order that he shall dispose of the money in the manner therein prescribed, and an action is not, under these facts, the proper means of redress. Neither is it important that the present defendant did not receive all the moneys directly from the railroad company. The other county treasurers, his predecessors in office, received the moneys *ex-officio*, and, failing to do with them as the statute required, they paid them over to their successors in office at the expiration of their respective terms, and the defendant now holds them by virtue of his position as county treasurer." The order directing the county treasurer to purchase bonds to the amount of the taxes or invest that amount in a sinking fund was, therefore, affirmed.

The above adjudications so clearly point out the way that in view of the facts conceded to exist in this proceeding, it is hardly possible to go astray. The petitioner is a taxpayer of the town of Bridgewater, and its present supervisor. I find no statute which makes any of the county funds in this county a special fund or which requires the county moneys to be subdivided according to the purpose to which any portion is to be applied. The present

system of bookkeeping was adopted by the county treasurer at the request of the board of supervisors in 1867 (Journal, 1867, p. 31), and seems to have been followed since that time. I find no statute authorizing or requiring the board of supervisors to prescribe any particular method. All of the county moneys of this county raised by general taxation, therefore, belong to and form a part of the general fund.

An examination of the Journals of the Board of Supervisors in evidence shows that at all times during the years 1891 to 1896, inclusive, the balance of the general fund in the county treasurer's hands has exceeded the sum of $2,578.10, the amount of money paid to the county treasurer during that period by the railroad in question as taxes levied upon lands in said town of Bridgewater. Under the authority of Spaulding v. Arnold, it must be presumed that that fund is still in his hands and must be applied as the statute directs. It appears that on March 1, 1890, there was a bonded debt of the town of Bridgewater, issued in aid of said railroad, to the amount of $1,500, which, with interest, amounts to upwards of $2,060.43. The Oneida county treasurer received from said railroad company from 1891 to 1896, inclusive, in taxes paid by said railroad company, assessed upon its property in said town, the sum of $2,060.43, exclusive of the town's share of said taxes.

I am, therefore, of the opinion that the county treasurer should be directed to purchase bonds of the town of Bridgewater, issued by said town, to aid in the construction of the Utica, Chenango & Susquehanna Valley Railroad, to the amount of two thousand sixty dollars and forty-three cents ($2,060.43), provided the same can be purchased at or below par, and cancel the same as required by law. If the same cannot be purchased at or below par, said county treasurer should be directed to invest said sum in the bonds of the United States, of the state of New York, or of any town or village or city of said state issued pursuant to law, and hold such bonds as a sinking fund for the redemption and payment of such outstanding railroad bonds. An order may be prepared accordingly.

Ordered accordingly.

THE PEOPLE ex rel. JOHN D. TRIPP et al., Relators, *v.* THE BOARD OF SUPERVISORS OF CAYUGA COUNTY, Defendants.

(Supreme Court, Monroe Special Term, February, 1898.)

1. **District attorney — Expenses for experts on a trial for murder — County charge.**

   Expenses, necessarily incurred by a district attorney under agreements made by him with medical witnesses sworn upon the trial for murder of a person belonging to an influential family, are a proper county charge under the County Law (Laws of 1892, chap. 686, § 230, subd. 2).

2. **Audit by supervisors — Demand — Mandamus.**

   Where the bills of such claimants are, after presentation to the board of supervisors, withdrawn from their consideration, the board has no power thereafter arbitrarily to audit the bills at amounts less than their face; but where the claimants, after their withdrawal of the bills, have made no subsequent demand for their audit, they are not entitled to a peremptory writ of mandamus requiring the board to convene and make the audit.

APPLICATION for a peremptory writ of *mandamus* requiring the board of supervisors of Cayuga county to assemble and audit the relators' bills for services as expert witnesses for the People on a trial for murder.

John D. Teller and James Lyon, for relators.

S. Edwin Day and H. Greenfield, for defendants.

DAVY, J. This is an application for a peremptory writ of *mandamus* requiring the board of supervisors of Cayuga county to assemble and audit the relators' bills for services as expert witnesses for the People on the trial of Frank N. Sheldon for the murder of his wife.

It appears, from the affidavits read on this motion, that the district attorney entered into a contract with the relators, eight in number, agreeing to pay them each fifty dollars for each day's attendance at court during said trial, and fifty dollars for each day in New York, making experiments at Bellevue Hospital, and also a reasonable compensation for other services in connection with

said case and all disbursements. The aggregate amount of the relators' bills was five thousand eight hundred and six dollars ($5,806). The board refused to allow the claimants fifty dollars a day for each day's service on the ground that the amount was unreasonable and exorbitant, and only allowed them twenty-five dollars per day.

The principal question raised upon this motion is whether the district attorney, in his official capacity, had power, under the statute, to employ expert witnesses in the Sheldon trial, and whether the expenses incurred therefor are a county charge.

The statute provides that "all expenses necessarily incurred by the district attorney in criminal actions or proceedings arising in his county shall be a county charge." The statute also provides that "the moneys necessarily expended by any county officer in executing the duties of his office in cases in which no specific compensation is provided by law shall be a county charge." 1 R. S. (Birdseye's 2d ed.), page 784. The duty and responsibility rests upon the district attorney to prosecute those who have been indicted by the grand jury for crimes committed and triable in his county. He was, therefore, charged with the duty of prosecuting Sheldon who had been indicted for the crime of murder in the first degree in killing his wife by shooting her at their home in the town of Brutus.

The district attorney states, in his affidavit, that sometime prior to the commencement of the trial, he learned that the theory of the defense was that she came to her death by her own act while suffering from mental derangement, and that a large number of expert witnesses would be called by the defendant, on the trial, to establish her insanity. That, upon learning these facts, he considered it necessary to secure the assistance of medical experts to consult and advise with in the preparation of the case and to attend and testify upon the trial. That he interviewed each of the claimants with a view of obtaining their services, and he was informed by each of them that they would not consent to be witnesses upon the trial unless they were each paid fifty dollars a day for each day's attendance at court, and for each day in making experiments at Bellevue Hospital, and also a reasonable compensation for other services that they might be required to render in the case. That he took the matter of such contract under consideration and consulted with Mr. Frank D. Wright, who was associated with him as counsel in the case, and also with some of the judges of the

courts and several members of the bar, as to the propriety of making such a contract. That after such consultation he concluded to make the proposed agreement. It was the duty of the district attorney, acting in the line of his duty as a public prosecutor, to secure the assistance of skilled expert witnesses, of high standing in the community, to meet the professional experts which the prisoner intended to call on his side.

The accused was charged with having perpetrated a horrible crime, which caused intense feeling and excitement in the community. The question whether the deceased came to her death by her own act, while suffering from mental derangement, was one in respect to which the opinion of medical men would be likely to exert a weighty if not controlling influence with the jury. It is evident that, if the district attorney had not taken the necessary steps to secure the attendance of competent experts of high standing as witnesses, he might have been censured as having been derelict in his duty to the people of the county as a prosecuting officer. In a case of such magnitude and interest as this it would be expected that the district attorney would procure the highest professional skill that he could command. It is a well-known fact that expert witnesses are usually paid extra compensation for their services when called in important cases, especially in homicide cases, and the question as to what amount they shall receive is usually regulated by contract. They cannot be required or compelled, if subpoenaed, to examine the case and give an opinion on a question of science. It is customary and frequently necessary for expert witnesses to attend during the whole trial and hear and carefully consider all the testimony given on both sides in order to fully qualify them to give a deliberate and intelligent opinion.

The district attorney also states in his affidavit that Sheldon is a member of a very large and influential family; that his brother at the time of the homicide represented one of the assembly districts of Cayuga county in the legislature, and that great influence was brought to bear on the part of his relatives and friends to secure his acquittal. It is plain to be seen, therefore, that there was resting upon the district attorney a great weight of responsibility. Every circumstance connected with the prosecution was watched by the keen eyes of the people. He knew that, if the accused was acquitted through any mistake on his part in the management of the case, he would be severely censured by the public. I am in-

clined to think that, if ever there was a case which required the district attorney to be vigilant in the discharge of the great duty imposed upon him, this was one. The statute clearly invested him with a discretion to decide as to the necessity of employing expert witnesses and the number required. The limitation is confined to necessary expenses. Counties and municipalities, like natural persons, are bound by the acts and contracts of their agents done and made within the scope of their authority. Angel & Ames on Corps. 288-301; Alexander v. Cauldwell, 83 N. Y. 485.

It seems to me, judging from all the facts in this case, that it was not only necessary, but it was the duty of the district attorney to employ competent expert witnesses, and, if necessary, to enter into an agreement to pay them a specified sum for their services. The services were performed on the faith of the official obligation of the district attorney to pay them fifty dollars a day during the trial.

The rule is, that in the absence of fraud or collusion, the acts of a public officer acting on behalf of a county within the limits of the authority conferred upon him by statute, and in the performance of his duty in dealing with third persons, are the acts of the county and cannot be repudiated by it. No different rule prevails in respect to this class of contracts than those made between private individuals. Baird v. Mayor, 96 N. Y. 592; Kingsley v. City of Brooklyn, 78 id. 215. It was his duty to do that which a faithful and vigilant district attorney would be expected to do, considering the magnitude and importance of the case, and that which was essential and necessary to the faithful performance of his official duty. Whether the expenses were unnecessarily incurred by the district attorney in the prosecution of Sheldon and the number of days that the experts were employed, are questions that the board of supervisors may inquire into, but they have no right to refuse to audit the claims unless they were unnecessarily incurred. The expenditures are to be deemed necessary within the plain meaning and intent of the statute, having in view what is due to the public at the time the contract was made and the efficient and faithful discharge of public duty.

The district attorney is the agent of the county, so far as his authority by statute extends, in the expenditure of money in the trial of criminal cases. Where, from the necessity of the case, the law is obliged to trust to the sound judgment and discretion of

an officer as to the propriety, legality or practicability of the performance of an act, and its manner of execution, the duty is of a judicial character, and the officer is only required to act faithfully as things shall appear to him, to the best of his ability. The liability of the county rests upon the ground that the expenses and disbursements were legitimately and necessarily incurred, and that the contract was made in good faith. Under such circumstances, it will not constitute a valid objection to the claims that the expenses or disbursements were not as reasonable as they ought to have been. If the district attorney acted in good faith and according to the usual and ordinary course in prosecuting parties for the crime of murder where the plea of insanity was interposed, the county must be held liable for the amount of these services, based upon the amount agreed upon by contract.

In Flagg v. Inhabitants of Millbury, 4 Cush. 242, Wilde, J., in speaking for the court, says: "By the word 'necessity' in the exception we are not to understand a physical and absolute necessity, but a moral fitness or propriety of the work and the labor done, under the circumstances of any particular case, may well be deemed necessity within the statute." Morris v. State, 31 Ind. 190.

Cases may arise of such magnitude and importance as to justify the district attorney in incurring expenses beyond what are ordinarily incurred in the trial of ordinary cases. That occurred in the case of People v. Montgomery, 13 Abb. (N. S.) 207, who was indicted for killing his wife. The plea of insanity was interposed in that case, and nearly all the prominent professional experts in western New York were retained by the defendant. The district attorney of Monroe county, after consulting Mr. Justice Dwight and the justices of the Court of Sessions and others, entered into an agreement with Dr. Hammond, of New York, to come to Rochester and attend the trial as an expert witness for the People, which occupied his time for about two whole days, for which the county paid him the sum of $500. Upon a motion for a new trial, the court held that it was proper for the district attorney to procure the attendance of skilled witnesses, in appropriate cases, for a special compensation at the expense of the county.

It was held in People ex rel. Bliss v. Supervisors of Cortland County, 39 N. Y. St. Repr. 313, that "The district attorney has power to hire a physician to attend a trial as consulting expert and as a witness, and to make a contract for a specific compensation to

be paid for such service, and where a board of supervisors refuse to properly audit such claim they may be compelled by *mandamus* to do so."

In People ex rel. Kelly v. Hawes, 12 Abb. Pr. 199, the court said: "The district attorney is a county officer, and in the performance of his general duties acts as a county officer, and that the Revised Statutes provide that the moneys necessarily expended by any county officer, in executing the duties of his office, and the contingent expense necessarily incurred for the benefit of a county, shall be deemed county charges."

In People ex rel. Johnson v. Supervisors of Delaware County, 45 N. Y. 199, the relator was, during the years 1859-1868, attorney for the board of excise of the county of Delaware. He presented to the board of supervisors of that county his bill for legal services rendered as attorney to the excise board, including services in two suits. The supervisors offered him $300 if he would release the county from all claims for costs and disbursements in the suits conducted by him. This proposition the relator declined and applied for a peremptory *mandamus*. On service of the *mandamus* the supervisors disallowed all charges for disbursements and services made and rendered in subpoenaing and procuring attendance of witnesses other than statutory fees, and also other claims. Folger, J., in writing the opinion of the court, says: "We have no doubt but that the board of commissioners of excise had the power to employ an attorney and counselor-at-law, to conduct for them their legal business, and to give them advice, from time to time, as they should need it. The act by which they are created imposes upon them the duty, when cases arise, of commencing and prosecuting legal proceedings. And as the board are the agents of their county in the matters confided to them, when acting for it therein, their contracts, express or implied, within the scope of their authority, for legal services, are binding upon the county."

The case of Neary v. Robinson, 98 N. Y. 81, was an action brought in a Justice's Court against the superintendent of the poor of St. Lawrence county, to recover for services rendered upon their employment by the plaintiff's attorney in bastardy proceedings instituted by them. Judge Finch, in speaking for the court, said: "The superintendents may properly employ professional assistance in conducting the proceedings. They become responsible as employers upon a contract which they are authorized to make, and whatever expense they thus incur, is made a county charge and

subject to the audit of the board of supervisors. The statute determines what are to be deemed county charges, and among them is specified, the moneys necessarily expended by any county officer in performing the duties of his office in cases in which no specific compensation for such services is provided by law.' "

In People ex rel. Hall v. Board of Supervisors of New York, 32 N. Y. 473, the case arose upon an application for a *mandamus* to compel the board of supervisors to audit the account of the relator for sheriff's fees amounting to $18,210.61, paid by the district attorney of the city and county of New York, in suits for penalties which he was required to prosecute under the Metropolitan Police Act. The court says: "The import of the words 'necessarily expended' is sufficiently evident, when we consider the purpose for which they were inserted, and the nature of the subject to which they are applied. They relate not to the necessity of payment as between the officer and the party to whom it is made, * * * but to the necessity of the expenditures, having reference to what is due to the public and the law, in the efficient and faithful discharge of official duty."

Judge Bradley, in expressing the unanimous opinion of the court, in People ex rel. Gardenier v. Supervisors, 134 N. Y. 8, says: "The power well recognized of district attorneys is to incur the expense of special compensation necessary to employ the services of experts to prepare themselves by investigation, in cases requiring it, to testify as witnesses upon the trials of persons charged with crimes." In speaking of the power of the district attorney to incur expenses, the learned judge says: "Although the power of such officer may be abused in so far that expenses may be immoderately and perhaps unreasonably incurred, that would be imputable to his want of sound judgment or a failure to properly exercise it in the particular case, and whether or not they are unnecessarily incurred in the exercise of his power would be a matter for inquiry by the body called upon to allow them and provide for their payment. That the expenses, necessarily incurred by the district attorney in the performance of his duty, embrace whatever is essential to bring a criminal to trial as well as the proceedings on trial, and if the accused is in a foreign jurisdiction, it includes expenses incurred in procuring his arrest and custody for the purpose of extradition in order that he may be brought within the jurisdiction of the court." Tompkins v. Mayor, 14 App. Div. 536; Kingsley v. Supervisors of Cortland County, 58 Barb. 139.

The affidavits show that the relators presented their bills to the board of supervisors at its last annual session, which were referred to the proper committees; that counsel for the respective claimants appeared before the board and urged that the claims be referred to a special committee, which request was refused. It was then determined that the matter should be heard in open board, and Saturday, December 11, was the day set for the hearing on said claims. Owing to the engagements of counsel for the claimants, the hearing was from time to time postponed until the 17th of December, when one of the counsel for the claimants appeared before the board and asked for a further adjournment, which the board refused to grant. Thereupon said counsel asked leave to withdraw the claims from the consideration of the board, which leave was unanimously granted by the board. That thereafter, and on December 18th, the reports of the committees having charge of said bills were adopted by the board, and the claims were audited, but at a reduction of one-half.

The affidavits also show that the claims were referred to a committee, but it does not appear that the committee or the board of supervisors summoned the district attorney or the relators or any other witnesses before them for an examination and inquiry as to the necessity and validity of the relators' accounts, which, under the statute, they had a right to do. The statute permits the board of supervisors to summon and examine witnesses and to summon any county officer in any matter within the jurisdiction of the board. 3 R. S. (Birdseye's ed.), page 2861. They did not report that any of the statements contained in the affidavits of the claimants were false; neither did they question the right of the district attorney to employ the relators as expert witnesses; neither did they impute any bad faith on his part in making the contract. They simply reported that they had examined the claims and that the alleged contract was unreasonable, and the price stipulated therein was exorbitant, and the amount mentioned in said bills was unnecessary, except as allowed. The board, by auditing a portion of the relators' bills, conceded the necessity of having expert witnesses on the trial, and such ratification gives to the act the same effect as if it were previously and duly authorized by the board. This rule applies to corporations as well as to individuals. Peterson v. Mayor, 17 N. Y. 449.

I am inclined to think that the board exceeded its authority when it audited the relators' bills after they had been withdrawn

from its consideration. Assuming, therefore, for the purposes of this application, that the accounts were illegally audited, the difficulty is that the relators are not in a position to entitle them to a peremptory writ of *mandamus*, for the reason that no request has been made to the board to audit the accounts since they were withdrawn. The rule is that a writ will not be granted to compel the board of supervisors or any other corporate body to do an act which it has never been asked to do. The petition should show a demand for performance of the act, and a refusal by the board. People ex rel. Thatcher v. Village of Hyde Park 117 Ill. 462; People v. Whitmore, 4 Mich. 27; 14 Eng. & Am. Enc. of Law, 167. It would be idle, therefore, to issue a peremptory writ commanding the board to assemble and act upon the relators' accounts when they are not before it for consideration.

The motion, therefore, for a peremptory writ of *mandamus* must be denied, with $10 costs to the defendants.

Motion denied, with $10 costs to defendants.

THE STANDARD FASHION CO., Plaintiff, *v.* THE SIEGEL-COOPER CO. et al., Defendants.

(Supreme Court, New York Special Term, February, 1898.)

Specific performance — Contract involving numerous acts, extending over a considerable time.

A complaint, in an action brought to procure the specific performance of a contract and an injunction, which alleges a breach by the defendants of an executory contract under which the plaintiff, a corporation dealing in patterns, was permitted to establish for two years an agency in the department store of the defendants, the agency being conditioned upon numerous provisions for the performance, from time to time, of acts for the mutual benefit of the parties in regard to which differences might easily arise, does not state facts sufficient to support a cause of action, as the court will not award a specific performance of a contract where it is evident, from its terms, that the action of the court will not be final and that its aid and intervention is likely to be repeatedly sought by the parties during the entire term of the contract.

DEMURRER to complaint on the ground that it fails to state facts sufficient to constitute a cause of action.

John M. Bowers, for plaintiff.

Edward C. Perkins, for defendants.

BEEKMAN, J. The complaint sets forth an executory agreement between the plaintiff and the defendant corporation, the Siegel-Cooper Company, and alleges that the said company has notified the plaintiff that it does not intend to perform the same, and asks for equitable relief by way of injunction.

By the terms of the agreement in question, the plaintiff contracts to conduct, at its own expense and risk, a pattern department on the ground floor of the defendant company's store, and to furnish its own employees, who are to be subject to the rules of the defendant company governing those employed in its service. There is a reciprocal obligation on the part of the Siegel-Cooper Company to furnish a definite location in the store for the plaintiff's business, the defendant company having the option of changing such location, with the single qualification that the new place shall not be less prominent nor of less space than the former, except between Thanksgiving day and Christmas of each year. The agreement in terms provides that the Siegel-Cooper Company is appointed the plaintiff's agent for the sale of standard patterns and standard fashion publications for a term of two years from the date specified in the contract, such term to be extended from year to year thereafter, unless terminated by a notice in writing to be given by either party to the other within a certain time which the contract prescribes. In furtherance of this engagement, the plaintiff binds itself to furnish to the defendant company, free of charge, not less than 250,000 eight-page fashion sheets of a specified kind. The defendant company in turn agrees to sell these sheets from its store, and to furnish wrapping paper and twine, free delivery to purchasers and other store facilities. It further binds itself "not to sell or allow to be sold on its premises during the duration of this contract any other make of paper patterns." It also agrees to pay over to the plaintiff two-thirds of all the moneys received from the sale of such patterns and fashion publications, settlements to be made weekly between the parties, and to make no charge for "cashiering," the remaining

one-third to be retained by the defendant company for its remuneration.

The contract also contains certain provisions under which each party engages to aid in advertising the business of the other. On the one hand, the plaintiff agrees to print an advertisement of the defendant company on the front and back of its fashion sheets without charge, and to change such advertisement monthly, if so requested by said defendant. On the other hand, the latter engages, but at the plaintiff's expense, to make frequent mention in its daily New York newspaper advertisements of the fact that it is the agent for the sale of plaintiff's patterns, and also to allow the plaintiff, at its own expense, to make a reasonable display of attractive show cards and signs at convenient places in the store, such cards and signs to be subject to the approval of the defendant company.

The complaint alleges that prior to the date on which performance of the contract was to commence, the defendant Siegel-Cooper Company entered into an agreement with the defendant, the Butterick Publishing Company, which was a business rival of the plaintiff, for the sale of its patterns at the same place, and notified the plaintiff that it would not perform the agreement which it had entered into as above stated. It is further alleged that the Butterick Publishing Company was not only aware of the plaintiff's rights, but also induced the Siegel-Cooper Company to violate its agreement with the plaintiff, and has agreed to indemnify it against the consequences of its unlawful act.

The court is now asked to adjudge that the Siegel-Cooper Company specifically perform its agreement, and that it be enjoined from selling or allowing to be sold on its premises, during the continuance of the contract, any paper patterns except those made by plaintiff, and that the Butterick Publishing Company be also restrained from selling its patterns at that place. A demurrer has been interposed on the ground that the complaint does not state facts sufficient to constitute a cause of action, and it is contended on the part of the defendants that the courts will not specifically enforce contracts of this character, and that the plaintiff has an adequate remedy at law for the breach of the contract.

It seems to be a well-established rule that the courts will decline to adjudge the specific performance of a contract which involves the future performance by either of the parties of continuous acts covering a considerable length of time. Fargo v. N. Y. &

N. E. R. R. Co., 3 Misc. Rep. 205, and cases there cited. The court will not be satisfied with directing a partial or one-sided enforcement of an executory contract, but if it affords any relief in equity at all, will enforce the contract as a whole and exact a compliance by the plaintiff with the engagements which he also has made. Justice demands and will be satisfied with no less than this. The contract is entire, and the obligation of one party is measured and is dependent upon the performance, in turn, by the other of the duties which he has undertaken. It is plain, therefore, that if specific performance of this contract should be adjudged in favor of the plaintiff, the latter also would necessarily come under the control and supervision of the court with respect to the further performance by it of its part of the contract, and the entire business covered by the contract would thenceforward during the entire period of its continuance be transacted under the arbitrament of the court. That this is extending the functions of the court beyond what is desirable or proper under our system of jurisprudence, seems to be recognized in cases more or less akin to the one at bar.

It is hardly necessary for me here to collate the authorities bearing upon the point. That has been already done to a large extent by Mr. Justice Barrett, in his able discussion of the principle involved, in the case of Fargo v. N. Y. & N. E. R. R. Co., *supra*. In that case the defendant entered into a contract with the express company of the plaintiff, which conferred upon the latter the exclusive right and privilege to control, direct and transact all the transportation business that might be offered to or controlled by either of the parties over and upon the passenger trains of the railroad company upon its main line and upon its branches, extensions and leaseholds. The contract contained a number of somewhat minute provisions for the purpose of insuring the necessary space upon the cars and other facilities along the line of the road requisite to the proper transaction of the extensive business which was in contemplation between the parties. The defendant company having refused to perform its contract, an action was brought to specifically enforce it, and an injunction against the defendant was asked for. After reviewing the terms of the contract, Mr. Justice Barrett says (p. 209): "A decree for specific performance couched in the precise terms of the contract itself, would be but the beginning of the judicial work. If, for instance, the court should adjudge that the railroad company at all times furnish a

sufficient space in its cars, and afford the express company from time to time, requisite and reasonable facilities, conveniences and rooms and the assistance of employees when necessary, etc., is it not entirely clear that the question of compliance would involve supplemental judgments, from time to time, upon subsequent and successive issues of fact? And would not the enforcement of the judgment upon these supplemental inquiries call for successive proceedings to punish for contempt? The answer must plainly be in the affirmative." The conclusion of the court was that the case was one coming within the rule above mentioned which denies the right to specific performance in such cases.

The fact, that the contract in question contains a stipulation by which the defendant Siegel-Cooper Company agrees "not to sell or allow to be sold on its premises during the duration of this contract, any other make of paper patterns," does not take the case out of the operation of the rule. Fargo v. N. Y. & N. E. R. R. Co., *supra.*

In Fry on Specific Performance (3d. ed.), § 862, it is said: "Even the presence of an express negative stipulation will not be found a sufficient ground for jurisdiction unless the contract is of a kind of which specific performance can be granted. In other words, it is probable that the court will hereafter, except so far as it may be bound by existing authorities, consider whether the contract in respect of which the injunction is sought is or is not of a kind to afford specific performance; that if it be the court will tend to restrain acts inconsistent with it, whether there be negative words or not; that if it be not of a kind to afford specific performance, no injunction will be granted, even though negative words may be present."

The leading case of Lumley v. Wagner, 1 DeG., M. & G. 604, and the cases which follow it, holding that injunctive relief will be granted, although the contract will not be otherwise specifically enforced, express an exception to the general rule in a particular class of cases where the subject-matter of the contract is the performance by the party enjoined of personal services that are special, individual and extraordinary. The case under consideration, it is apparent, does not come within this exception.

A consideration of the contract here shows the necessity for the performance by the parties thereto, from time to time, and with great frequency, of various acts, some of them of such a nature that differences between the parties are quite likely to arise

as to whether there has been a due performance of the contract or not. If the court is to grant the relief asked for, it becomes bound, as we have seen, to assume a jurisdiction which would compel it, from time to time and as often as such differences might arise, to intervene and see to it that its judgment was carried into effect. The conditions are thus found to exist which bring the case within the mischief which the rule refusing equitable relief under such circumstances was designed to prevent. It would, therefore, seem to follow that the relief sought in this action cannot be granted.

If I am right in this conclusion, the complaint does not state facts sufficient to constitute a cause of action and the demurrer must be sustained. Demurrer sustained, with costs, with the usual leave to the plaintiff to amend on payment of costs.

Ordered accordingly.

Matter of the Application of ADELAIDE MILLS AS TRUSTEE, ETC.

(Supreme Court, New York Special Term, February, 1898.)

Trusts — Sale of corpus, to pay off incumbrances created by remaindermen, refused.

The provisions of the Real Property Law (Laws 1896, chap. 547, § 85, as amended by Laws 1897, chap. 136) afford no authority to the court to permit a substituted trustee of an express trust in lands, created by a will containing no power of sale, to sell the corpus in order to pay off incumbrances which remaindermen have voluntarily and for their own purposes imposed upon their shares; and such a direction would be particularly indefensible where the effect of a sale would be, nominally, at least, to cut off the interests of contingent remaindermen in being, as well as the interests of those not in being.

MOTION at Special Term, to compel purchasers to take title to property sold under a final order in a special proceeding taken under section 85 of the Real Property Law, for leave to mortgage or sell a trust estate.

William Man (of counsel), for petitioner.

Julius J. Frank and Myer S. Isaacs, for purchasers.

BEEKMAN, J. This is a motion to compel the purchasers to take title to the real property above mentioned, which was sold to them at public auction pursuant to the final order in this proceeding. Their refusal to complete is based solely upon certain objections to the proceedings, which, if well taken, are fatal to the power of the trustee to convey a title in fee-simple absolute.

It appears that prior to April 8, 1865, one Richard Cromwell died seized and possessed of the premises in question, leaving a will and codicil thereto, which were duly admitted to probate on the date above mentioned. The codicil contains the devise which it becomes necessary to consider. Under such codicil the testator devised the premises in question to two trustees in trust to collect the rents during the lives of his daughter-in-law, Elizabeth R. Cromwell, widow of his deceased son, Richard Cromwell, and his sister-in-law, Anna Merritt, and, after paying the expenses of administration, to apply one-half of the net income to the payment of the interest and principal of a mortgage which affected the premises (now paid), and to apply the other half of the net income, or, in case there should be no mortgage upon the property, the whole of said net income in the following manner, namely: to pay the sum of $500 a year in equal quarterly payments to said Elizabeth R. Cromwell during her natural life; also to pay to the said Anna Merritt the sum of $500 a year in equal quarterly payments during her natural life, and to apply the remainder of said net income to the support and education of the children of testator's deceased son, Richard; if such remainder of said net income should be more than sufficient for the support and education of the children, then to accumulate the same for their benefit until the termination of the trust. It was further provided as follows: "After the death of my said daughter-in-law and sister-in-law it is my will that the said property in this clause devised and the accumulations of the net income above named shall go and be divided in fee to and amongst the children of my said son, Richard, who shall be then living, and the issue of such as may be dead, the issue of such deceased children of my said son to take the share of their deceased parents."

The two trustees have since deceased, and the petitioner, who is a daughter of testator's deceased son, Richard, has been appointed in their place to administer the trust. The persons in being who are now interested in the property are as follows: Elizabeth R. Cromwell, who is entitled to an annuity of $500; Frank Cromwell,

Albert Cromwell and Adelaide Mills, comprising all the children of testator's deceased son Richard; the five infant children of the said Albert Cromwell, and the four infant children of Adelaide Mills. Frank Cromwell is unmarried and without issue.

It will be observed that, under the devise, only those children of the testator's deceased son Richard who are living at the termination of the trust, are entitled to share in the property. They take a vested remainder, subject, however, to be defeated by their decease before the termination of the particular estate; and in that event there is a substitutionary gift in favor of the issue of any such children who may have so died, such issue taking as purchasers under the will the share which the deceased parent would otherwise have had. Anna Merritt, one of the *cestuis que vie*, is dead, and the duration of the trust is now dependent solely upon the life of Mrs. Elizabeth R. Cromwell. The will contains no power to sell or mortgage the premises in question.

It appears from the record in this proceeding that Mrs. Mills has conveyed her interest in the remainder to her infant children. It also appears that, prior to the conveyance so made, she and her brothers Frank and Albert, on December 19, 1888, mortgaged their interests under the will in the property in question to William Man, as trustee, to secure the payment of the sum of $15,000 and interest. Subsequently, Albert Cromwell from time to time made other mortgages to the same mortgagee upon the one undivided third part of said property to which he was entitled in remainder, subject to the contingency expressed in the will, to secure further loans made to him, aggregating $12,500 and interest. Adelaide Mills did not receive any portion of the moneys which were realized upon the mortgage first above mentioned; and in order to indemnify her, her two brothers executed mortgages to her upon their respective interests. In addition to the mortgages so taken by Mr. Man, certain life insurance policies upon the lives of the mortgagors were taken out or transferred to him as additional security. Subsequently, an action was instituted by him to foreclose his mortgages, and on January 27, 1896, a judgment of foreclosure and sale was duly entered, the sum due thereon amounting now to about $40,000. No sale has as yet been had under this judgment.

This proceeding is instituted under section 85 of the Real Property Law, as amended by chapter 136 of the Laws of 1897. As thus amended that section declares that if the trust is expressed in

the instrument creating the estate, every sale, conveyance or other act of the trustee in contravention of the trust, except as therein provided, shall be absolutely void. It then states that "the Supreme Court may by order, on such terms and conditions as seem just and proper, authorize any such trustee to mortgage or sell such real property or any part thereof whenever it appears to the satisfaction of the court that said real property, or some portion thereof, has become so unproductive that it is for the best interest of such estate, or that it is necessary or for the benefit of the estate to raise funds for the purpose of preserving it by paying off incumbrances or of improving it by erecting buildings or making other improvements, or that for other peculiar reasons, or on account of other peculiar circumstances, it is for the best interest of said estate, and whenever the interest of the trust estate in any real property is an undivided part or share thereof, the same may be sold if it shall appear to the court to be for the best interest of such estate."

The reasons given by the trustee, who is the petitioner, for the authority to mortgage or sell which she asks, are that it is necessary for the preservation of said estate that the judgment of foreclosure and sale so made shall be paid and satisfied, and that, unless it is so paid and satisfied, the interests of the parties entitled in remainder will be sold under said judgment; that a sale under such circumstances will not yield the actual value of the property, whereby heavy deficiency judgments will result against Frank Cromwell, Albert Cromwell and Mrs. Mills, and the interests of the parties, including those of the infants, will be sacrificed and lost to them.

The referee to whom the matter was referred approved of these grounds as sufficient, and advised the court that an order to mortgage or sell should be granted. The report has been confirmed by an order of this court, which authorizes the property to be mortgaged or sold, and directs the proceeds, after the payment of certain costs and expenses attending the proceeding, to be applied to the satisfaction of the judgment of foreclosure and sale which has been recovered by Mr. Man. The petitioner has reported to the court that being unable to find a person who was willing to make the loan, she has sold one of the parcels at public auction to Messrs. Rosenweig and Franklin for the sum of $30,500, and the other parcel to Herbert B. Plass, for the sum of $24,100. The objection of the purchasers to the title tendered to them rests upon the con-

tention that the court had no power or jurisdiction under the statute to authorize either a mortgage or a sale of the property on any of the grounds stated in the proceedings.

It becomes necessary, therefore, to consider the nature and scope of the statute under which this proceeding has been taken. At the outset it may be said that the policy of the state has always been that the trustee of an express trust, such as the one now under consideration, should have no power to alienate the trust property, except in so far as he might be permitted so to do by the instrument creating it. The object was a meritorious one. It was recognized that cases constantly occurred where it was of importance that a testator should be able to make a sure and certain provision for the support of claimants upon his bounty, which would be quite beyond the ability of anyone to defeat or impair by improvident or wrongful act, and accordingly it was provided by statute that any act of the trustee in contravention of this trust should be void, and also that the beneficiary should have no power to alienate or incumber the income for the payment of which to him the trust was created. That still continues to be the law of the state and its policy, except in certain contingencies which, since the year 1882, have been grafted upon the statute, and which are now expressed in section 85 of the Real Property Law, as above quoted. It was found that conditions at times supervened after the creation of the trust, presumably not anticipated by its creator, which either imperiled the trust property or rendered it so unproductive that the object of the trust had become wholly or in part defeated, or which made it necessary to improve it. It was for the purpose of further protecting the trust estate and sustaining it that the provisions thus added to the statute were enacted, as, I think, the context of the section in question clearly shows. It was not the intention of the legislature to abridge or modify in any way the scheme or nature of the trust and its dependent limitations, or to subvert in any way the general intention of the creator of the trust, but solely to furnish the trustee with means for its protection which otherwise were not available.

In the case at bar there is no claim, nor could there be any on the facts presented, that there was any occasion to mortgage or sell the property in question because it was unproductive or that there was any necessity for improving it. There are, therefore, but two of the grounds specified in the statute on which this proceeding could be predicated; either that there are incumbrances

affecting the trust estate which must be discharged, or that other "peculiar reasons" or "other peculiar circumstances" exist which render it "for the best interest of said estate" that the authority asked for should be granted.

The question, then, which first arises is: Are the incumbrances in question within the purview of the statute? Doubtless, an application for leave to mortgage or sell may properly be made where there are prior mortgages which must be paid off, or where assessments for public improvements have been imposed or taxes have fallen in arrears, or where there are other liens or charges affecting the property that are paramount, and which are susceptible of enforcement under conditions which would imperil the trust estate. But in all cases the incumbrances must be of such a character that it is necessary to discharge them, in the words of the statute, "for the purpose of preserving the estate." It is, I think, quite plain that the case at bar does not at all come within the meaning and intent of the statute. In the first place, the incumbrances are mortgage liens which do not affect the trust estate at all. They were not created by the testator nor by the trustee, but by those entitled only in remainder. In no way can the trustee be affected by them or by a sale under the judgment foreclosing them. In the event of such a sale the trust estate would still continue, the limitations over would remain unimpaired, and the only effect of it would be a transfer of ownership from one person to another. What possible interest, then, has the trustee, as such, in the matter? The trust estate is not imperiled, nor are the interests in remainder in jeopardy by reason of any such sale. Whether the estates in expectancy are to go to the remaindermen mentioned in the will or to their grantees is of no possible concern to the trustee. The remaindermen have a legal right to sell and convey their interests, and the purchaser would stand in all respects in the shoes of his grantors, claiming the property through the latter, subject to the same contingencies and in entire harmony with the devise.

The fallacy of the contention of the petitioner is thus made quite plain. The only persons who can suffer from the conditions described in the petition are the remaindermen named in the will, who have, by their voluntary act, incumbered their interests in the property; and they suffer solely from consequences of their own creation, and not by reason of any exigency which concerns the trust estate or through any lack of power on the part of the trustee to protect or preserve it. In short, the matters complained

of are purely collateral, and do not prejudicially affect the devise or the property which is the subject of the devise.

But it is contended that the proceeding may be sustained on the ground that the facts relied upon in support of it come within the other provision of the statute which permits a mortgage or sale where it appears to the satisfaction of the court "that for other peculiar reasons or on account of other peculiar circumstances it is for the best interest of said estate." It is clear, however, that this provision must be construed in the light of the general intention and purpose of the statute. That general purpose and intention, as we have seen, was to prevent the trust estate from being defeated in whole or in part by reason of circumstances subsequently arising which threatened its integrity, and where the limitations upon the power of the trustee left him without adequate remedy. The rule "*noscitur a sociis*" applies, and the cases of which cognizance can be taken under this general clause must be those of the same general character as the particular instances previously enumerated. Again, by the necessary import of the language used, the peculiar reasons or circumstances must be such as relate to the trust estate and its well-being, for by the terms of the statute they must be of such a character as to render it "for the best interest of said estate" that a sale or mortgage should be authorized. That is not the case here. As I think I have already shown, the reasons given for a mortgage or sale of the property in question have no relation to the preservation, protection or improvement of the trust estate. This being so, the case is not one which comes within the statute, and the court was, therefore, without jurisdiction to make the order under which the sale has been had. Indeed, it is difficult to see how any other conclusion is possible.

It is proposed to sell the entire trust property in order to pay the indebtedness of certain remaindermen, which they, by their voluntary acts, have charged upon their interests, thus absorbing about four-fifths of the *corpus* of the estate for purposes which have nothing to do with the trust or its administration. Is this an act for the preservation, protection or improvement of the trust estate? But this is not all. It is further proposed to cut off the contingent remaindermen, those not in being as well as those in being, from any interest in the property, and to destroy the limitations made by the testator in their favor for the benefit of their parents, although their estate is derived in no sense through their parents, but directly from the testator under the will.

It will not, of course, be disputed that no lien, charge or conveyance which might be created or made by the parents could possibly affect the contingent limitations in favor of the children. The interests are separate, distinct and independent. But if this proceeding is to be upheld, the court will be in the position of having appropriated the property of the children to pay the debts of their parents without shadow of justification for it in law or in morals. The simple statement of the proposition suggests its refutation. It is manifest that the legislature never intended to sanction such an act of spoliation, nor could it, within its constitutional limitations, authorize property to be taken from one person and given to another, or applied to the discharge of the debt of another. It is manifest that the grounds on which this proceeding has been predicated find no support whatsoever in the statute.

The expedients adopted to mitigate the effect of the order with respect to the interests of the contingent remaindermen do not avoid the unlawful invasion upon their rights which has been attempted. Counsel for petitioner calls attention to section 87 of the Real Property Law, as amended by chapter 136, Laws of 1897, which provides, among other things, that the final order in such a proceeding as this shall be valid and effectual against all minors and persons not in being interested in the trust or having estates vested or contingent in reversion or remainder in the real property affected. But this, of course, presupposes a proceeding properly initiated on one or more of the grounds sanctioned by the preceding section, and power in the court to confer the authority which the order expresses. If this is absent, the order is a nullity and has no effect whatsoever. Especially must this be so with respect to those not in being in whose favor future estates in the property have been created, and with respect to whom no estoppel could be claimed by reason of any acquiescence in or assent to the order, even assuming, which I do not concede, that such an order could bind anyone who was not free to transfer his interest in the property without it.

I think it is plain that the petitioner is unable to tender a good title to the purchasers, and that the motion to compel them to complete the purchase must be denied, with costs.

Motion denied, with costs.

MATILDA SCHIERLOH, Plaintiff, *v.* ANNA SCHIERLOH et al., Defendants.

(Supreme Court, New York Special Term, February, 1898.)

Dower — Fees of referee — Sheriff's fees.

The fees of the sheriff of the city and county of New York, upon a sale of real property made under an execution, are controlled by a special statute (Laws of 1890, chap. 523, § 17, subd. 7, as amended by Laws of 1892, chap. 418), and not by subdivision 7 of section 3307 of the Code of Civil Procedure; and as a referee in an action for dower brought in the county of New York is, subject to the limitation of $500, entitled to the fees of the sheriff (Code of Civil Procedure, § 3297), he must be allowed similar fees and disbursements up to the limit of $500.

PROCEEDINGS to determine the compensation of a referee in an action of dower.

George H. Yeamans, for plaintiff.

George W. Roderick, for defendants.

FREEDMAN, J. Among other things, I am called upon to determine the compensation of the referee in this action after a sale of the premises under the judgment. Under section 3297 of the Code of Civil Procedure, the referee's fees in foreclosure cases cannot exceed $50 on a sale for less than $10,000, and cannot exceed $500 in any other case. The case at bar is for dower, and the only limitation is the $500 limitation. The amount on which the referee's compensation is to be calculated is $9,000. By section 3297, as amended in 1891 and 1895, the fees of a referee to sell property pursuant to a judgment are the same as those allowed to the sheriff, with the added provision — which, however, does not apply here — that where there is a security to be taken or a distribution or an application of part of the proceeds to be made, the referee is further entitled to one-half of the usual executor's commissions. Turning, then, to the table of fees for the sheriff (§ 3307, subd. 11), it appears that the sheriff's fees are as follows: For posting and publishing the notice of sale, for selling and conveying real property, in pursuance of a direction contained in a judgment, the like fees as for the same services upon the sale of real property by virtue of an execution; but, where the real property is sold under a judgment in an action to foreclose a mortgage, the sheriff's entire compensation cannot exceed $50. The next

question then is, what are the fees of the sheriff upon the sale of real property under and by virtue of an execution? This depends, as a general rule, upon subdivision 7 of section 3307, which provides: For collecting money by virtue of an execution, etc., in any county except New York, Kings or Westchester, three per centum upon the sum collected not exceeding $250, and two per centum upon the residue of the sum collected; and in either of the counties of New York, Kings or Westchester, two and one-half per centum upon the sum collected not exceeding $250, and one and one-quarter per centum upon the residue of the sum collected. It further appears, however, that in 1890 a special act was passed (chap. 523) entitled "An act in relation to the office of sheriff of the city and county of New York," and that by subdivision 7 of section 17 of that chapter the percentages allowed to the sheriff of New York are increased as to him to 5 per cent. on the first thousand and two and one-half per cent. on the next $9,000 and one per cent. over and above $10,000. Chapter 418 of the Laws of 1892 in express terms is an amendatory act of the act of 1890. Among other things it provides for poundage to the sheriff where an execution has been vacated or set aside, and to that extent amends subdivision 7 of chapter 523 of the Laws of 1890. These two acts have never been repealed. The question, therefore, arises how they are to be construed with reference to subdivision 7 of section 3307 of the Code. In Titman v. Mayor, 60 Hun, 123, the question involved related to the construction of subdivision 6 of section 17 of the act of 1890 with reference to subdivision 6 of section 3307 of the Code, and the General Term held that the act of 1890 provided a general scheme in relation to the fees of the sheriff of the city and county of New York, independently of and uncontrolled by the general provisions of the Code of Civil Procedure in relation to the fees of sheriffs, and that it is to be regarded as having repealed by implication the part of subdivision 6 of section 3307 of the Code under consideration by the court. By analogous reasoning it must be held that, upon the question relating to the fees of the sheriff of the city and county of New York upon the sale of real property under and by virtue of an execution, subdivision 7 of section 3307 of the Code has been superseded by the act of 1890, above referred to, as amended by the act of 1892. This view receives additional support from the very language of section 3308 of the Code, from which it will be seen that it was the opinion of the legislature from the start that

the fees and expenses of the sheriff of the city and county of New York might well be regulated by special statute. For the reasons stated, subdivision 7 of section 3307 of the Code must be read as if it had been amended by striking out the words relating to the sheriff of the city and county of New York. My conclusion is that the fees of the sheriff of the city and county of New York upon the sale of real property, under and by virtute of an execution, are fixed by the provisions above quoted of the act of 1890, as amended by the act of 1892, and that, consequently, the compensation of the referee in the case at bar should be calculated upon the same basis. In Darling v. Matthews the attention of Mr. Justice Russell does not seem to have been sufficiently called to the acts of 1890 and 1892. Let an order be presented on notice determining the fees of the referee in accordance with this opinion.

Ordered accordingly.

ALONZO C. MONSON, as Trustee of the Trust Created for the Benefit of REUBEN B. WITHERS, by the Last Will and Testament of DAVID DUNHAM WITHERS, Deceased, Plaintiff, *v.* VIRGINIA M. PAINE et al., Defendants.

(Supreme Court, New York Special Term, February, 1898.)

1. **Will — Contingent remainders — Vesting — Distribution.**

Where the will of a testator, after devising his estate to trustees with directions to them to divide it into five equal parts and pay the income of each share to one of his five brothers and sisters for life, declares in substance, that the interest of a life tenant, dying without issue, shall pass *per stirpes* to the lawful issue of the other brothers and sisters, except that in the case of the death of one sister her son by her former marriage and his issue should alone inherit, the death of this son, without issue and before his mother, does not render the share, which upon the death of the life tenant of another share, he would otherwise have taken, undevised assets to be distributed among the next of kin of the testator, but it should be added to the other residuary shares, as the intention of the testator manifestly was that the beneficiaries should take only future contingent remainders, divisible among them as a class upon the death of a life tenant without lawful issue.

2. Same — Construction — Intestacy to be avoided.

A will should be construed as to avoid intestacy; and a construction, not necessary, should be condemned where it would have the effect of allowing a person to take who was expressly excluded from any benefit under the will and where it would also enlarge certain life estates into fees.

ACTION by a trustee for a final judicial settlement of his accounts, and for directions as to the distribution of the trust fund.

Shipman, Larocque & Choate, for plaintiff.

Coudert Brothers, for Virginia M. Paine.

William H. Handford, for Elizabeth Mary Ludlow.

McCurdy & Yard, for Cora de Raucourt.

Kellogg, Rose & Smith, for Augustus Clason, individually and as administrator, and William P. Clason.

Hand, Bonney, Pell & Jones, for Alfred W. Withers, William B. Withers, and Virginia de Boulement, and Catherine P. Withers.

John B. Murray, for William Paine and Mary H. Bischoffsheim.

FREEDMAN, J. This action is brought by the plaintiff, as trustee of a certain trust created by the last will and testament of David Dunham Withers, deceased, for the life use of his brother Reuben B. Withers. By the complaint, the plaintiff prays for a final judicial settlement of his accounts as such trustee and for directions as to the distribution of the trust fund among the parties who shall be determined to be entitled to participate in its division, etc. There is no dispute as to the accounts. But a question has been presented as to the construction of that part of the will designated as the sixth subdivision of the second clause relating to the disposition of the capital of the said trust fund on the death of the life beneficiary. The question arises in consequence of the death, without issue, of Reuben B. Withers, the life tenant, on July 6, 1897, and of the death, without issue, of Robert Center, men-

tioned in the said clause, occurring before the death of Reuben B. Withers, but during the lifetime of his mother, the defendant Elizabeth Mary Ludlow, and the question is whether the proportion of the fund which would have gone to Robert Center, in case he had survived the life beneficiary, is to be added to the other residuary shares, or is to be distributed among the next of kin of the testator as in case of intestacy.

Taking up the will, we find a well-defined and consistent scheme running through the whole of it. The entire estate was given by the testator to his executors as trustees and they were directed to divide it into five equal shares or parts and to set apart and hold the said shares or parts and receive the income * * * thereof in trust and dispose of the same as follows:

(1) The trustees were to apply the net income of one share to the use of the testator's sister Mrs. Ludlow (formerly Mrs. Center), during her life. Upon her death they were to "pay, transfer and convey the said equal part or share to her son Robert Center or to his lawful issue in equal portions if he should be then deceased leaving such issue then surviving." Art. 2, subd. 1.

(2) The trustees were to apply the net income of another share to the use of testator's sister, Mrs. Clason, during her life. Upon her death, they were to "pay, transfer and convey the said equal part or share to her lawful issue her surviving in equal portions, share and share alike, *per stirpes* and not *per capita.*" Art. 2, subd. 2.

(3) By similar language, as in the case of Mrs. Clason, the trustees were to apply the net income of another share to the use of the testator's sister Virginia Paine and of another share to the use of each of the testator's brothers, Alfred D. Withers and Reuben B. Withers with remainder, in each instance, to the issue of the life beneficiary, by the same language as is applied to the issue of Mrs. Clason. Art. 2, subds. 3, 4 and 5.

(4) "In case said Robert Center should die before his mother, leaving no lawful issue of him surviving her, then and in that event it is my will that the equal part or share of my said estate, to the * * * income of which the said Elizabeth Mary Ludlow is entitled during her lifetime, be upon her death paid * * * to the lawful issue then surviving of my said sisters and brothers, Euphame, Virginia, Alfred and Reuben, in equal portions and share and share alike but *per stirpes* and not *per*

capita." "And in case any of my said sisters and brothers, Euphame, Virginia, Alfred and Reuben, should die without leaving lawful issue surviving her or him so dying, in that case it is my will that the equal part or share of my said estate, to the * * * income of which the sister or brother so dying without such issue surviving was entitled during her or his lifetime, be upon her or his death paid, transferred and conveyed to the said Robert Center (or to his lawful issue then surviving if he be then deceased leaving such issue) and to the lawful issue then surviving of the other of my said sisters and brothers, Euphame, Virginia, Alfred and Reuben, whichever of them may have lawful issue then surviving, in equal portions and share and share alike but *per stirpes* and not *per capita*, the said Robert Center (or his lawful issue then surviving, if he be then deceased) taking one equal part thereof and the lawful issue then surviving of each of the other of my last above-mentioned sisters and brothers, Euphame, Virginia, Alfred and Reuben, taking one equal part thereof, that is to say, the lawful issue of each stirpes taking together and share and share alike one of such equal parts." Art. 2, subd. 6.

The fundamental rule of construction, in a case of this kind, is that the intent of the testator must govern and that such intent is to be sought from the provisions of the whole will as they may appear in the light of the facts and circumstances existing at the time of the making of the will. When thus considered the intent of the testator in the case at bar is exceptionally free from uncertainty or ambiguity.

The bounty of the testator is rigidly limited to certain named sisters and brothers, Mrs. Ludlow, Mrs. Clason, Mrs. Paine, Alfred D. Withers and Reuben B. Withers and to their issue surviving them, excepting in the case of Mrs. Ludlow, of whose issue only her son Robert Center or his issue are admitted to share. One of the testator's sisters Madame de Raucourt, and all issue of Mrs. Ludlow, other than her son Robert or his issue, are excluded from participation, whether direct or contingent.

It is obvious that the sole reason for separate mention of Robert Center and his issue was to insure such exclusion of other children of Mrs. Ludlow and their issue. Otherwise the sixth subdivision would have been abbreviated to its last portion, in which Mrs. Ludlow and her issue would have been simply named and grouped with Mrs. Clason, Mrs. Paine, Alfred D. Withers and Reuben B. Withers and their issue. Such a grouping was the plain purpose

of the testator, excepting that no issue of Mrs. Ludlow, other than her son Robert or his issue, was to be admitted into the group.

The language of the sixth subdivision, in itself, imports such a purpose and is consistent with no other purpose. It begins with the share, put in trust for the life use of Mrs. Ludlow, and provides for the contingency of death of her son Robert during her life "leaving no issue of him surviving her." The provision is that, upon her death, the share, theretofore held in trust for her, shall be paid to "the lawful issue then surviving of my said sisters and brothers, Euphame (Mrs. Clason), Virginia (Mrs Paine), Alfred and Reuben in equal portions, share and share alike but *per stirpes* and not *per capita*." Here, at the outset, the issue of these last-named four brothers and sisters are designated to fill the vacancy caused by the death of Robert Center (without issue) and to succeed to the share of which his mother Mrs. Ludlow was life beneficiary. The subdivision then proceeds to provide for the same contingency as to each of the other four trust shares. And the provision designates, for contingent remaindermen, the same issue with the addition of Robert Center or "his lawful issue then surviving, if he be then deceased leaving such issue." The issue thus designated, including Robert Center or his issue (as such representative of his mother's issue), were to take "in equal portions" *per stirpes*. And by way of final regulation of the distribution we have the "that is to say the lawful issue of each stirpes taking together and share and share alike one of such equal parts."

In other words Robert Center (or his issue), surviving his mother, were to succeed her. He or they, surviving either of the other life beneficiaries who died childless, were to share the succession with the then living lawful issue of the other life beneficiaries, excepting his mother. In either case, if neither Robert Center nor his issue were living to take a portion, he and they were simply to drop out of the reckoning and the succession was to pass wholly to the issue of Mrs. Clason, Mrs. Paine, Alfred D. Withers and Reuben B. Withers, who were living when the succession happened.

From the foregoing considerations, it is evident that the plain intention of the testator was that the interest of the beneficiaries named in the sixth clause should not vest at the death of the testator, but should be contingent on the death of the life tenant without lawful issue. In such a case the beneficiaries take as a class and not as tenants in common. Matter of Baer, 147 N. Y. 348.

True, the general rule is, that specific mention by name of the beneficiaries vests in them an interest as tenants in common. But that rule always yields to the intent of the testator as gathered from the will. This was expressly decided by the Court of Appeals in Hoppock v. Tucker, 59 N. Y. 202.

In the case at bar the construction, that the beneficiaries named in the sixth clause took as tenants in common, would, under the circumstances of this case, result in a partial intestacy in the disposition of his estate by the testator and this would be clearly against his manifest intent, for he evidently intended to dispose of his entire estate and made no provision for any residuary one. But if it be held that the remaindermen took as tenants in common, the share bequeathed to Robert Center is necessarily undisposed of, in which event Elizabeth Mary Ludlow and Virginia M. Paine as well as Cora de Raucourt would inherit, together with the issue of Euphame and Alfred. This would be directly against the plain intention of the testator.

1. Because Cora de Raucourt would receive a share;

2. Because Mrs. Ludlow and Mrs. Paine would each receive a share absolutely while the testator gave them a life estate only; and

3. Because the lapsed legacy would form a residuum, when the testator contemplated none.

Independently of these considerations, it is a well-known rule of law, that a will should be so construed as to avert the result of intestacy whenever it is in any wise reasonably avoidable.

So a construction to the effect that Robert Center's share or portion became, at some time, a part of his estate, and as such became capable of being disposed of by his will or of being distributed as provided by statute in case of intestacy, would also be directly against the testator's intention, because Robert Center having died before his mother, Elizabeth Mary Ludlow, his share under his will would go to her, when the testator intended it to go to his issue, if any (that is children or other descendants), and upon his death, without issue, to the issue of the other brothers and sisters.

The conclusion is, therefore, unavoidable that, under the will in this case, Robert Center, or his lawful issue and the issue of Euphame, Virginia, Alfred and Reuben, were to take as a class and not as tenants in common, because futurity was annexed to the substance of the gift and the will vested no interest in them at

the time of the death of the testator, but only upon the death of Reuben B. Withers, the life tenant, without issue, at which time the persons then living and coming within the class were to take the whole *per stirpes.*

The cases, of which Moffett v. Elmendorf, 152 N. Y. 483, is the most recent, do not, when fairly considered, militate against the construction thus arrived at. In them there was "nothing on the face of the will to indicate that they (the legatees) compose a class." Here there is every such indication. In them, there was no grouping or classing of issue of various persons with part of the issue of another person, for the purpose of taking, among them, a remainder in case they were in existence upon the happening of a contingency. Here we have precisely such a grouping or classing and for precisely this purpose.

From the foregoing considerations it follows that upon the decease of Reuben B. Withers, in July last, the share theretofore held by the plaintiff in trust for his life use became distributable as follows:

(1) One-third of it passed to the now living children of Mrs. Euphame Clason.

(2) Another third passed to the now living children of Mrs. Virginia Paine.

(3) The remaining third passed to the now living children of Alfred D. Withers, who are William B. Withers, Alfred W. Withers and Virginia de Boulemont, excepting that by virtue of transfer *inter sese* the share of Alfred W. Withers is payable to his wife Katherine P. Withers.

Ordered accordingly.

Matter of the Application of The Trustees of the Board of Publication and Sabbath School Work, Plaintiff and Judgment Creditor, for the Examination of William J. Harsha, Defendant and Judgment Debtor.

(Supreme Court, New York Special Term, February, 1898.)

Supplementary proceedings — Property affected and exempt.

Proceedings supplementary to execution are directed against property which, at the time of the order for his examination, the judgment debtor has in his possession or under his control, or which is actually due to him; and no property subsequently acquired, nor any

future earnings of any kind, or earnings for personal services rendered within sixty days preceding the order, if necessary for the use of his family, can be reached either as against him or as against third parties who are alleged to have in their hands property of the judgment debtor.

PROCEEDINGS supplementary to execution for the examination of the judgment debtor and other parties who are alleged to hold property in their hands belonging to said judgment debtor.

Roger Foster, for plaintiff.

Edward S. Clinch, for defendant.

FREEDMAN, J. The substantial facts out of which the various proceedings now to be determined arose, are as follows:

On February 6, 1896, the plaintiffs recovered a judgment in this court against Dr. Harsha for $4,706.82. Execution was issued to the sheriff and returned unsatisfied. Thereafter the defendant was examined in supplementary proceedings and on April 6, 1896, an order was made appointing Frank J. McBarron receiver of the property of the judgment debtor.

On June 5, 1896, an action was commenced by the receiver against the judgment debtor, Edward S. Clinch, The Reformed Low Dutch Church of Harlem, Thomas Crawford, individually and as treasurer of The Reformed Low Dutch Church of Harlem, and others, to have a certain assignment made by the judgment debtor to Edward S. Clinch declared null and void and for an accounting by Mr. Clinch for all moneys received by him thereunder, and that the defendants Clinch, Crawford and The Reformed Low Dutch Church pay to the receiver certain moneys belonging to the judgment debtor. In the course of that litigation, it appeared that the judgment debtor was in receipt of a yearly salary of $5,000 from the church, that in order to make some provision for the payment of some creditors, he had about February 11, 1895, assigned to Edward S. Clinch, $2,000 of his said yearly salary, to be used in making settlements with said creditors, and that under this assignment Clinch had received and disbursed certain moneys and still held some of them. Mr. Justice Beekman who tried the case, found that the said assignment was void as against the plaintiffs in this action because it hindered and delayed them in the prosecution of their claim, that the sum of $250 a month was during the times mentioned in the complaint and amended complaint a sufficient provision for the support and

maintenance and use of the judgment debtor and his family, and that Clinch, after making such allowance, was liable to pay over to the receiver the balance with which he then was found chargeable. Under this decision Mr. Clinch paid to the receiver as follows:

Amount found by Mr. Justice Beekman to be in Clinch's hands	$476 63
Interest thereon	45 87
Proportion of the salary for March, 1896	166 66
Interest thereon	15 37
	$704 53

Towards the payment of the item of $166.66 and the interest thereon of $15.37, and the costs of the action taxed at $172.43, Clinch received the check of Mrs. Harsha for $398.37, and the said three items were paid with the proceeds of said check, leaving, after allowing Clinch $15 for disbursements, a balance of $28.91 in his hands.

Upon affidavits made on behalf of the judgment creditors containing, in addition to the usual proof necessary to sustain the application in each instance, irrelevant matters and insinuations entirely out of place, separate orders were granted for the examination of Dr. Harsha, the judgment debtor, of Mr. Clinch, and of the ministers, elders and deacons of the Reformed Low Dutch Church. The examinations were had. On the part of the church, the treasurer, Thomas Crawford, was examined. Upon the close of the examinations the attorney for the judgment creditors made several motions to compel the payment over of several amounts which he claimed to have discovered, and to extend the receivership of Frank J. McBarron, the receiver heretofore appointed, to such amounts.

The motions will have to be separately considered with reference to the state of the proof against each party proceeded against. But before doing this it may be well to ascertain clearly what property of the judgment debtor may be reached by supplementary proceedings, from what moment any such property becomes bound, and what power the court possesses to direct the application of earnings for personal services.

Supplementary proceedings are of a purely statutory character and the statute limits the power of the court in such proceedings

to existing rights and things *in esse* at the time of the institution of the proceedings.

The language of the statute is that the judgment creditor is entitled to the order of examination "upon proof * * * that the judgment debtor has property which he unjustly refuses to apply towards the satisfaction of the judgment," etc. Code of Civil Procedure, § 2436.

And where it appears from the examination "that the judgment debtor has in his possession or under his control money or other personal property belonging to him," the judge may order such money to be paid over and such other personal property to be delivered up. Code of Civil Procedure, § 2447.

The uniform current of authority is, and always has been, that proceedings supplementary to execution are directed against property which the judgment debtor has in his possession, or under his control, at the time the order is obtained. Potter v. Low, 16 How. Pr. 549; Winters v. McCarthy, 2 Abb. N. C. 357.

If moneys coming to the judgment debtor are sought to be reached, they must be actually due at the time the order is obtained. Potter v. Low, 16 How. Pr. 549; Atkinson v. Sewine, 11 Abb. (N. S.) 384; Stewart v. Foster, 1 Hilt. 505; Columbian Institute v. Cregan, 3 N. Y. St. Repr. 287.

And the proof as to the possession or control by the judgment debtor should be clear. Peters v. Kerr, 22 How. Pr. 3; Hall v. McMahon, 10 Abb. Pr. 103.

Supplementary proceedings do not affect property acquired after they have been commenced. Merriam v. Hill, 1 Week. Dig. 260, and cases cited; Potter v. Low, 16 How. Pr. 549; Caton v. Southwell, 13 Barb. 335; Rainsford v. Temple, 3 Misc. Rep. 294; 22; N. Y. Supp. 937; McCormick v. Kehoe, 7 N. Y. Leg. Obs. 184; Albright v. Kempton, 4 Civ. Pro. 16; Sands v. Roberts, 8 Abb. Pr. 343.

And earnings becoming due after the service of the order for examination cannot be reached. Gerregani v. Wheelwright, 3 Abb. (N. S.) 264.

And this is so as to future earnings though they were to become due under an existing agreement to pay a royalty on goods to be manufactured. Woodman v. Goodenough, 18 Abb. Pr. 265.

If it is doubtful whether the money was earned before or after the order, the debtor is entitled to the benefit of the doubt. Potter v. Low, 16 How. Pr. 549.

So the salary of a public officer, while in the hands of the disbursing officer in common with other money, cannot be reached. Waldman v. O'Donnell, 57 How. Pr. 215; Remmey v. Gedney, 57 id. 217, n.; Columbian Institute v. Cregan, 3 N. Y. St. Repr. 287.

This rule has been observed so strictly that in First National Bank v. Beardslee, 8 Week. Dig. 7, it was held that under an order granted on a certain day a salary which does not become payable until the close of that day cannot be reached.

And by section 2463 of the Code of Civil Procedure it is further provided that the statute relating to supplementary proceedings does not authorize the seizure of, or other interferences with, any property which is especially exempt by law from levy and sale by virtue of an execution, and that it does not authorize the seizure of the arnings of the judgment debtor for his personal services rendered within sixty days next before the institution of the special proceeding, when it is made to appear, by his oath or otherwise, that those earnings are necessary for the use of a family wholly or partly supported by his labor.

The intent of the legislature is plain. A debtor's duty to his family is recognized so far that, if he has a family wholly or partly supported by his labor, he may, if necessary, always have sixty days back earnings exempted, and, in Miller v. Hooper, 19 Hun, 394, it was held that this was a humane provision and should be liberally construed in favor of the debtor.

In Bush v. White, 12 Abb. Pr. 21, it was held that the sixty days ran back from the order for the application of the debtor's property, and not from the original order for his examination. The case arose under section 297 of the old Code which at that time read "for sixty days preceding the order." But when the present Code of Civil Procedure was enacted, the words "before the institution of the special proceeding" were substituted in place of the words "preceding the order" and the law upon this point has remained the same ever since.

From the foregoing the following summary may be extracted, viz.:

That proceedings supplementary to execution are directed against property which, at the time of the order for his examination, the judgment debtor has in his possession or under his control, or which is actually due to him, and that no property subsequently acquired and no future earnings of any kind and no earnings for personal services rendered within sixty days preceding such order, if necessary for the use of his family, can be reached.

The same rule applies to all supplementary proceedings against third parties, for every one of them proceeds upon an allegation to the effect that the third party has certain property belonging to the judgment debtor which then and there ought to be applied towards the satisfaction of the claim of the judgment creditor.

Having now clearly defined the limits within which in the course of supplementary proceedings property of the judgment debtor held by him or in the hands of third parties may be reached, the several motions made before me will now be determined with reference to the state of the proof against each party proceeded against.

As to the ministers, elders and deacons of the Reformed Low Dutch Church:

The proceeding against them is based upon an affidavit sworn to January 3, 1898, alleging (among other things not material to be specifically mentioned) "that the sum of $416.66 is due and owing to said William J. Harsha, defendant and judgment debtor herein, by the said the ministers, elders and deacons of the Reformed Low Church of the Ninth ward of the city of New York, of which church the said Harsha is pastor, for his salary for the month of December 1897."

Upon this affidavit an order was made by Mr. Justice Cohen directing the said officers of the church and Thomas Crawford, the treasurer of the church, to appear on January 6, 1898, to be examined concerning the said sum of $416.66, claimed to be due as aforesaid.

Under this order Thomas Crawford was examined as treasurer of the church and, in the course of his examination, it appeared that the said sum, representing the said salary for December, 1897, had been paid on December 21. No testimony to the contrary was given. The fact thus established entitles the officers of the church to an order denying the motion made against them and dismissing the proceeding as against them. Under the circumstances of this case they should also have $30 costs.

As to Mr. Edward S. Clinch:

The proceeding against him is based upon an affidavit and an order made thereon dated January 22, 1898. By that order he was directed to appear on January 26, 1898, and submit to an examination concerning the sum of $398.37, alleged to be in his hands and belonging to the judgment debtor. The testimony upon that point shows a balance in his hands of $28.91 as hereinbefore

stated. The claim that such balance belongs to Mrs. Harsha cannot be sustained. The check was given by Mrs. Harsha to her husband for his benefit and was by him delivered to Clinch, to be used by the latter for the benefit of the judgment debtor. Moreover the check itself represented the proceeds of a note made by Dr. Harsha and his wife jointly and discounted by the Hamilton Bank. Mr. Clinch must, therefore, be ordered to pay over this balance of $28.91 and the receivership of the receiver should be extended so as to include that sum. There is nothing else with which Mr. Clinch can be charged. The assignment by Dr. Harsha to Mr. Clinch was surrendered by the latter on June 23, 1896, and no moneys were received by him thereunder after March 1, 1896.

As to Dr. William J. Harsha:

The proceeding against him is based upon an affidavit, upon which he was ordered under date of January 3, 1898, to appear and submit on January 6, 1898, to a general examination concerning his property. As against him the examination was not to be confined within the narrow limits within which the examination of Mr. Crawford and of Mr. Clinch had to be confined, especially as the allegation against him was that since a former examination in supplementary proceedings had under an order dated March 2, 1896, he had collected monthly the sum of $166.66 over and above what was necessary for the support of himself and family. This claim of the judgment creditors in effect concedes that $250 of the monthly salary of $416.66 is necessary for the support of Dr. Harsha and his family, and it is only the monthly excess of $166.66 which is sought to be reached. Such excess, it is claimed, has been determined by Mr. Justice Beekman not to be necessary for the support of Dr. Harsha and his family. An examination of the record shows, however, that by his decision Mr. Justice Beekman simply held that a certain sum in the hands of Mr. Clinch and the sum of $166.66, a portion of the salary for March, 1896, were over and above what was necessary for the support, maintenance and use of the judgment debtor and his family. The judgment as originally entered, read:

"That the sum of two hundred and fifty ($250) dollars a month is and has been during the times mentioned in the complaint herein a sufficient provision, etc."

This was subsequently, on motion, modified so as to read:

"That the sum of two hundred and fifty ($250) dollars a month was during the times mentioned in the complaint and amended complaint herein a sufficient provision, etc."

And this was subsequently, on motion, further amended so as to read:

"That the sum of $476.63 in the hands of Edward S. Clinch, received by him under said assignment, and the sum of $166.66 in the hands of the defendant The Reformed Low Dutch Church of Harlem, which amounts were by the decision herein directed to be paid to the plaintiff, were during the times mentioned in the complaint and amended complaint, over and above what was necessary for the support and maintenance of the judgment debtor, William J. Harsha and his family."

This sufficiently shows that the judgment rendered by Mr. Justice Beekman is not an adjudication binding upon me in the proceedings now pending before me and that the amount to be allowed as a suitable provision for the support of Dr. Harsha and his family, if it should become necessary to determine it, is open for determination upon the facts as they now appear.

The question then remains as to what was discovered by the examination of Dr. Harsha. The installment of salary coming to him at the end of January, 1898, cannot, under the authorities hereinbefore referred to, be reached under the order for his examination made January 3, 1898. The installments of monthly salary, due to him since March, 1896, had been paid to him. The installment for December, 1897, had been paid to him on December 21, 1897. Under the authorities cited he was free to spend these moneys. There being no other property liable to seizure, the case against him is, therefore, narrowed down to the question how much of these earnings, and of a few other earnings of a trifling character discovered, he had left in his hands on January 3, 1898, and, if there is any such unexpended balance, whether it should be taken from him as unnecessary to the support of himself and his family. His examination was a searching one and it extended over a number of days. Being too voluminous to be discussed here in detail, it must suffice to say that he fully accounted for the expenses of himself and his family and showed that, although during the period in question he had received at the rate of $2,000 a year more than he did while the assignment to Mr. Clinch was in force, he had actually expended that additional sum, partly for purposes for which Mr. Clinch would have paid if the assignment to him had not been set aside, partly for increased family expenses caused by tuition bills for his children; partly for the support of his father, a clergyman seventy-six years of age; and partly for special personal

necessities, and that on January 3, 1898, there was not only nothing left, but that on the contrary a grocer's bill, a tailor's bill, a doctor's bill, and some small amounts for periodicals remained unpaid. The closest scutiny of the matters disclosed by his examination fails to show any property of any kind in his possession or under his control on January 3, 1898, which could be applied toward the satisfaction of the judgment of the judgment creditors. That being so, it is unnecessary to determine at the present time what portion of the salary of the judgment debtor should be sequestrated for the benefit of the judgment creditors herein. The final result is that the motion against him must be denied, and the present proceeding against him dismissed. In view of all the facts and circumstances disclosed by the record the dismissal should be with $30 costs.

Let orders be entered in accordance with this opinion after settlement on notice.

Ordered accordingly.

LEILA O. HENRIQUES et al., Plaintiffs, *v.* THE MIRIAM OSBORN MEMORIAL HOME, Impleaded et al., Defendants.

LEILA O. HENRIQUES et al., Plaintiffs, *v.* THE YALE UNIVERSITY, Impleaded et al., Defendants.

(Supreme Court — New York Special Term, February, 1898.)

Partition — Reply of alleged heirs attacking a will, established as against them — Final judgment on demurrer.

Where it appears from the pleadings in an action, brought by alleged heirs at law to partition lands formerly of a testatrix and also attacking her will, that the plaintiffs are her sisters, that she left an only son, whose will has been judicially established by a judgment in an action to which the plaintiffs were parties, and that his will made no provision for them, a reply interposed by them, which attacks his will and also alleges that the judgment establishing it was fraudulent and void, is a mere statement of a legal conclusion; and as the plaintiffs show no right to maintain the action as heirs-at-law of the testatrix, the defendants are entitled to final judgment.

DEMURRER by defendants to plaintiffs' reply in each case.

McCurdy & Yard (Delos McCurdy, of counsel), for plaintiffs.

Shearman & Sterling (Thomas G. Shearman, of counsel), for defendant, The Miriam Osborn Memorial Home Association.

Robert L. Redfield (John E. Parsons, of counsel), for Yale University.

FREEDMAN, J. The questions involved in both cases are substantially the same.

In each case the plaintiffs sue for the partition of the real estate of Mrs. Miriam A. Osborn, deceased, who died in March, 1891. She left a will and codicils the validity of which is attacked by the plaintiffs for various reasons. The plaintiffs describe themselves as the only surviving sisters of Mrs. Osborn, and, together with the defendant, Henriette Olive Trowbridge, the only heirs-at-law of Mrs. Osborn. The complaint, however, further shows that, at the time of her death, Mrs. Osborn had a living son, Howell Osborn, who died in 1895. The complaint then demands judgment that Mrs. Osborn's will be declared void and that the real estate described be partitioned between the two plaintiffs, and the defendant Trowbridge.

In each case, the defendants, after denying some parts of the complaint, plead by way of affirmative defense that Miriam A. Osborn left her surviving a son, Howell Osborn, who was her only child and sole heir-at-law; that he died in February, 1895, leaving a last will and testament, which is fully set forth, in which he made no provision for the plaintiffs; and that this will was not only duly admitted to probate as a will of real and personal property, but was further declared to be the valid will and testament of Howell Osborn, deceased, by a judgment of this court, entered on June 11, 1897, in an action to which the plaintiffs, as well as the defendant, Henriette Olive Trowbridge, were parties, and in which they appeared.

To this affirmative defense, containing allegations of new matter and avoidance, the plaintiffs were, by order of the court, required to reply, and did so.

This reply denies that the will set forth in the answer is the will and testament of Howell Osborn, deceased; that it is valid, or was executed by him, and avers that it was procured by fraud, duress and undue and improper influence.

The reply, however, expressly admits that the paper set forth in the answer as the will of Howell Osborn was duly admitted to probate as a will of real and personal property; that an action was

brought in this court "for the alleged purpose of establishing the validity of said alleged will of said Howell Osborn, deceased, and that these plaintiffs were made parties thereto, and appeared therein; that on default a verdict was directed by the court in said action, reciting that the alleged will of the said Howell Osborn was valid, and that thereafter a judgment was rendered in accordance therewith; but these plaintiffs deny that said judgment has any validity, force or effect in this action, or upon the rights of these plaintiffs."

To this reply the answering defendants demurred, as insufficient.

I fail to perceive how this reply can be sustained.

It concedes the fact that Howell Osborn was the sole heir-at-law of Mrs. Osborn because it admits that he was her child and her only child. This being so, the plaintiffs are not the heirs-at-law of Mrs. Osborn. To maintain the action on the theory of the invalidity of Mrs. Osborn's will the plaintiffs must, therefore, show not only that Howell Osborn died substantially intestate, but also that the plaintiffs are his heirs-at-law. This they do not attempt to show. Although it appears that they are Howell Osborn's maternal aunts, it nowhere appears that all the lines of descent which would have the right to claim before them are exhausted, or, in other words, that Howell Osborn left no child and no father. There is no presumption to that effect.

But aside from these considerations it fully appears from the facts admitted, as distinguished from the conclusions averred, not only that Howell Osborn was the sole heir-at-law of Mrs. Osborn, but also that when he died he left a will in which he made no provision for the plaintiffs, and that the validity of this will, as a will of real and personal property, has been judicially determined against the plaintiffs. They were parties to, and appeared in, the action which resulted in such determination. They were invited to contest Howell Osborn's will and they abstained and allowed judgment to go against them. It is no valid objection that judgment went by default. Brown v. Mayor, 66 N. Y. 385, 390.

The judgment was obtained in pursuance of section 2653a of the Code of Civil Procedure. This statutory provision was passed in 1892, for the very purpose of providing a proceeding to establish the validity of a will as a will of real and personal property, and a judgment rendered under it is conclusive upon all parties to the action and all others claiming under or through them.

There is nothing in the proposition that the plaintiffs may avoid the consequences of such conclusiveness by bringing an action

under section 1537 of the Code. That section, it is true, permits a person claiming as heir to maintain partition, notwithstanding an apparent devise, upon proof of the invalidity of such devise. But, even if it be granted that, as a matter of pleading, the plaintiffs may set forth a cause of action for partition under section 1537, and, in it, may attack the will of Mrs. Osborn either with or without an attack upon the will of Howell Osborn, the real difficulty to be met by them arises when they are confronted with the proof that they are the lawful heirs of neither of the testators and that the validity of the will of Howell Osborn has been already established against them. Such proof is now before the court.

There is no inconsistency between section 2653a, passed in 1892, and section 1537, passed in 1853. If there were such inconsistency, section 2653a repealed, *pro tanto*, section 1537.

The admitted facts being as stated, the allegation of the reply that the judgment establishing the validity of Howell Osborn's will has no valid force and effect upon the rights of the plaintiffs, and is merely the statement of a legal conclusion, unsupported by any fact, and for that reason unavailing.

The case of Bowen v. Sweeney, 89 Hun, 359, cited by plaintiffs' counsel, has no application here, because, in it, there had been no prior adjudication determining the validity of the will as a will of real estate and the action had been brought four years prior to the enactment of section 2653a.

The demurrer should be sustained and judgment rendered for the defendants, and as it is plain that the plaintiffs cannot truthfully amend, leave to amend should not be granted. Upon sustaining a demurrer to a replication to a plea which goes to the whole cause of action, it has repeatedly been held that a final judgment for the defendant is proper. 6 Ency. of Pl & Pr. 355, and cases there cited.

Ordered accordingly.

WILBUR D. ELLIS et al., Executors, etc., Plaintiffs, *v.* ELLEN M. GRANGER et al., Defendants.

(Supreme Court — New York Special Term, February, 1898.)

Will — Construction as to a distribution.

Where a will directs that a sum of money shall be distributed by executors among the nephews and nieces of the testator upon the ratio which the number of children and grandchildren of each nephew

and niece bears to the total number of the children and grandchildren of all the nephews and nieces, nephews, who have neither children nor grandchildren, take nothing.

ACTION for the construction of a will.

Putney & Bishop, for plaintiffs.

Ottenbourg, Jenks & Springs, for defendants.

FREEDMAN, J. This action is brought for the construction of the eleventh clause of the will of John Ellis.

By that clause the testator gives to his executors the sum of $15,000 in trust, to divide and pay over the same among his nephews and nieces who are the children of his brothers Lewis and Richard Ellis and of his sister Desiah Belding, the children of such of his said nephews and nieces who might be deceased at the time of his death to take the share which their deceased parent would have had if surviving. At the same time and by the same clause the testator directs the manner of the payment and the distribution of the gift as follows:

"I direct that the said fifteen thousand dollars be divided by my executors and paid over as follows, to-wit: they are to ascertain how many children and grandchildren each of such nephews and nieces, including the children of the said nephews and nieces, who have heretofore died, or may die before I do, have living at the time of my death, and they are to take the aggregate number so arrived at as the unit of division, and to pay over to each of said nephews and nieces living, and the children of those who shall then have died, such proportion of said sum as the number of their respective children and grandchildren living at the time of my death, in each case, shall bear to the said aggregate number of children and grandchildren. The division above mentioned is to be made among my said nephews and nieces living, and the children of those who shall have died prior to the time of my decease.

"I further will and direct that in case any of the children of said deceased nephews and nieces entitled to a share of this bequest shall be minors at the time of my death, then my said

executors shall and are hereby directed to pay over the share of such minor, in every case, to his or her parent, if any such parent is living, otherwise to such guardian or other trustee of such minor as may be duly appointed, the parent or guardian in each case to receive such share in trust, with power to apply the income thereof, or the principal or any part thereof, for the benefit or support of the minor in each case, during minority, as may be wise and necessary. I direct that the share of each person entitled to take under the above provision who shall be of age, at the time of my decease, be paid over to such person, and the remainder, if any, of the share of any minor so entitled to take, be paid over to him or her upon his or her becoming twenty-one years of age."

One of the nephews, George W. Ellis, interposed an answer admitting the allegations of the complaint and claiming a share of the $15,000. But he had neither children nor grandchildren.

The following facts stand conceded:

1. There were eleven nephews and nieces or their representatives who survived the testator;

2. The combined number of children and grandchildren of nine of such nephews and nieces was fifty-eight at the time of the testator's death; and

3. There were two of such nephews who had neither children nor grandchildren, to-wit: Waite Belding and George W. Ellis.

The question to be determined is whether the two nephews who have neither children nor grandchildren are entitled to a share of the said fund, and, if so, what share.

My opinion is, that the said sum of $15,000 is to be divided among (not between) the testator's nephews and nieces referred to and the surviving children of those deceased, so that each nephew and niece and the children of each one deceased get just so many of said fifty-eighth parts of said $15,000 as he or she has children and grandchildren; that is, that the division of the said sum among them is based entirely on the ratio which the number of each one's descendants bears to the total of the descendants of all, and that from this it follows, of necessity, that where there are no descendants there shall be no payment of any part of said sum.

This seems to me to be the only feasible construction to be put upon the clause in question when considered as an independent one, and such construction derives additional support when the said

clause is considered in connection with all the other provisions of the will, because it then appears that the two nephews who cannot take anything under the said clause are otherwise provided for, namely, George W. Ellis by the seventh clause and Waite Belding by the twenty-first clause.

The bequest under the eleventh clause should, therefore, be distributed in accordance with this opinion.

Ordered accordingly.

JAMES A. HACKETT, Plaintiff, *v.* EDWARDS, MERRILL & CO., Defendant.

(Supreme Court — New York Special Term, February, 1898.)

Offer of judgment — Retraction.

An offer of judgment, made in an action by the defendant, under section 738 of the Code of Civil Procedure, cannot be retracted upon the same day, as the statute gives the plaintiff ten days in which to consider the offer which, during that period, is irrevocable.

MOTION to set aside a judgment.

G. Washburn Smith, for plaintiff.

Philip Carpenter, for defendant.

PRYOR, J. In an action for damages for a personal injury to an infant, the defendant, on the 2d of February, served on plaintiff's attorney an offer of judgment for $500 and costs. On the 8th of February, about 2 o'clock in the afternoon, plaintiff's attorney obtained an order of court authorizing the infant's guardian *ad litem* to accept the offer. About 3 o'clock of the same afternoon defendant's attorney sent to plaintiff's attorney a "notice of the withdrawal of the offer of judgment," which notice plaintiff's attorney promptly returned, with a denial of defendant's right to retract the offer. Thereafter, on the same afternoon, plaintiff's attorney served on defendant's attorney notice of acceptance of the offer, and immediately entered judgment for the amount of the offer. The defendant moved to set aside the judgment, and the question is: Was it open to it to withdraw the offer?

It is the rule, in the negotiation of contracts, that until acceptance an offer is revocable, for the reason that until the minds of the parties have met there is no binding agreement, and if there be no agreement they are equally free from obligation.

By section 738 of the Code "the defendant may, before the trial, serve upon the plaintiff's attorney, a written offer, to allow judgment to be taken against him;" and if, within ten days, the plaintiff return a written acceptance of the offer, he may enter judgment accordingly. Here is no mere treaty between parties, but a regulation of procedure; by which, on the one hand, the defendant is afforded an opportunity to escape the costs of litigation and the contingency of a larger judgment against him; while the plaintiff, on the other, is enabled to assure himself a recovery for at least some amount. It is a statutory provision; and it reserves no right of retraction to the defendant. On the contrary, ten days are secured to the plaintiff for acceptance of the offer — a plain implication that for that period the offer is to stand. If before the lapse of such time the defendant may withdraw the offer, then has plaintiff not had the ten days for acceptance accorded him by the act.

If we apply the canon *noscitur a sociis* in the interpretation of the provision, its intent is clear. Obviously, the tender authorized by sections 731-734 is irrevocable. So of the admission of the genuineness of a paper pursuant to section 735. The offers to liquidate damages and to compromise in the succeeding sections are no less incapable of recall. The defendant is under no obligation to make the offer; but having made it, the law holds him to it until by the expiration of the option allowed the plaintiff for acceptance he is restored to his original rights. McVicar v. Keating, 19 App. Div. 581; Walker v. Johnson, 8 How. Pr. 240. Upon any other construction, the statute would become an instrument of trifling and chicane.

The right of the defendant after rejection of one offer to make another, is no way inconsistent with the conclusion that an offer may not be withdrawn before rejection.

Motion denied, with costs.

ROBERT ROSSMAN et al., Plaintiffs, *v.* LEWIS M. SEAVER et al., Defendants.

(Supreme Court — New York Special Term, February, 1898.)

Insolvent corporations — Preferential judgments — Stock Corporation Law.

Proof that the president of an insolvent corporation, which was indebted to his cousin, consented that the debt be divided into several notes, each of which was within the jurisdiction of the City Court of the city of New York, to the end that a foreign assignee of the cousin might obtain upon the notes summonses in that court returnable in two days, and that, after the summonses had been served upon the corporation, the president concealed the fact and refrained from putting the corporation into the hands of a receiver until after judgments had been obtained upon the notes and levies had been made under executions, renders the judgments void under the Stock Corporation Law (Laws of 1892, chap. 688, § 48), prohibiting an insolvent corporation from making transfers with a preferential intent.

ACTIONS to set aside judgments and executions obtained against a corporation.

Charles E. Rushmore, for plaintiffs.

Abram Kling, for defendants.

RUSSELL, J. The proof makes the presumption clear that Charles E. Ensign, the president of the insolvent corporation, Kirtland, Andrews & Co., favored the preference of the indebtedness against the company held by his cousin, Herman L. Ensign, to the amount of $6,200, and interest. This president took some action towards the transfer of securities, but abandoned the effort on account of its probable invalidity. He caused the note of $5,000 to be split up into smaller ones so that they and the $1,200 note might be sued in the City Court of New York, being thus brought within its jurisdiction. He kept secret the service of the summons, so far as he was able, and so leisurely made preparations for insolvent proceedings against the company that judgments were obtained and levies made before this court obtained jurisdiction of proceedings instituted for the equal benefit of all creditors. He thus had the reasonable right to infer that the creditor, assisted by his own action,

would take such effective means as lay within his power to secure a preference by legal proceedings. Among those effective means adopted by the creditor was the transfer of the notes to a business associate in the state of New Jersey for the purpose of procuring two days' summonses in the City Court, and thus avoiding all the delay possible. The consenting action of the president of the company, therefore, lay in the direction of conveniently splitting up the securities so that the creditor might if he chose obtain a speedier judgment than otherwise, by keeping silent as to the service of the summonses and refraining from putting the company into the hands of a receiver until after the judgments were obtained. As a matter of course the creditor holding the original paper, which was overdue, had the right to proceed in the Supreme Court and obtain a judgment in twenty-one days, for there was no defense to the claim and it would have been a misuse of legal proceedings to have interposed any answer, or to have obtained delay by extension of time to answer on the plea of a defense which did not exist.

It must always be remembered, in passing upon the statute, Laws of 1892, chapter 688, section 48, which forbids transfers or judgments in view of insolvency by a corporation, that there is a wide difference between the transfers referred to in that section and the suffering of a judgment. No creditor can compel a transfer by way of preferential security or lien; he can compel the rendition of a judgment upon a claim which is without defense. The security or lien cannot be received by the creditor without the action of the debtor; the judgment can be obtained without it. Where an offer of judgment is made, or one confessed, the intent to prefer, as well as the sufferance of the judgment, are manifest; and a conclusion not entirely superficial might be drawn that the activity, on the part of the president of the corporation, which hastened the period within which the creditor could get judgment, might, for the purpose of preferential intent, be equivalent in substantial effect to an offer of judgment itself, unless grave authority to which we must defer has decided otherwise.

In French v. Andrews, 145 N. Y. 441, the Court of Appeals held that the splitting up of a claim of $10,096.19, a part of which was not due, into eleven notes so that actions might be begun in the Municipal Court of Rochester, and judgments be obtained by default in six days, was not a violation of the section, as adopted in 1890, which referred only to transfers or assignments and did

not inhibit the sufferance of a judgment. That case also reiterated the doctrine of Varnum v. Hart, 119 N. Y. 101, which held that silence, after the service of the summons, was not in effect a preferential assignment or transfer by the officers.

This case is relied upon by the counsel for the defendants as conclusive; but it is easy to see that, within the terms of the law as it then existed, the obtaining of a judgment was not and could not have been an offense against a statute which prohibited an assignment or transfer. And Judge Peckham, in his opinion, notes the change by the amendment of 1892, with a suggestion which seems to carry the inference that, if the statute, then under contemplation, had prohibited the suffering of a judgment, the decision of the Court of Appeals would have been different.

It is very certain that the preference, obtained by the judgment creditor through his execution liens, would not have been obtained as early as it was without the active aid of the president of the insolvent corporation. He helped on a speedy recovery with the intent of preference, and held off proceedings which would have brought equal division without preference. If this is not suffering judgments with preferential intent, irrespective of the question as to whether at a later period the creditor could have obtained his judgments or not, the statute is meaningless and entirely ineffective. Olney v. Baird, 7 App. Div. 95.

The case of Ridgway v. Simons, 4 App. Div. 98, is not authority for the defense that the plaintiffs are bound by the order directing the receiver to sell and convert the property into cash, which would be subject to the liens of the executions. In that case the executions were released upon the condition that the receiver should sell and pay those executions, and such an order was made upon a motion in which all parties interested were represented. Here the order of sale leaves the lien of the executions as they were, valid or invalid, affecting only a change of the thing upon which they might be liens. That order does not render valid judgments and executions which, but for its making, would be invalid.

Let judgment be entered vacating the judgments and executions, turning over the property to the receivers, requiring Herman L. Ensign and Lewis N. Seaver to account for all moneys coming to their hands through said judgments and executions, with costs to the plaintiff against Seaver and Herman L. Ensign.

Ordered accordingly.

MANTON B. METCALF et al., Plaintiffs, *v.* MORRIS MOSES et al., Defendants.

(Supreme Court, New York Special Term, February, 1898.)

Fraudulent transfers, including a friendly receivership — When the receivership will not be vacated.

A scheme, perfected by the assent of preferred creditors, under which a solvent firm, by means of various assignments to and judgments confessed in favor of such creditors, by the collusive appointment of a friendly receiver in an action brought between the partners and by other acts indicating fraud, is reduced in nine months to a condition where all the firm and individual assets are placed beyond the reach of an execution and where the sale of its entire assets, made at a properly managed receiver's sale, is insufficient to pay unpreferred creditors forty per cent. of their claims, cannot be upheld and the transfers and confessions of judgment must be declared void as made with an intent to hinder, delay and defraud creditors; but where an additional and unobjectionable receiver has been appointed in the partnership action, creditors who have not levied executions before the appointment of the first receiver, cannot obtain the vacation of the receivership, and both receivers will be directed to take the entire partnership property and its proceeds, free from the fraudulent transfers and judgments, and divide it equitably among the creditors.

ACTION to set aside fraudulent transfers of real and personal property and confessions of judgments made by partners.

Nelson S. Spencer and Otto C. Wierum, Jr., for plaintiffs.

A. Blumenstiel, for Bernard Moses and others.

Samuel Greenbaum, for Lilianthal.

John Frankenheimer, for E. A. Marcus.

James Byrne, for Franklin, receiver.

RUSSELL, J. This action is brought to set aside the fraudulent transfers and confessions of judgment made by the debtors, Lesser Brothers, who were merchants doing business in the city of New

York. In January, 1896, that firm had a surplus of assets over liabilities of $153,866.24. On the 2d day of October, 1896, nine months later, the entire property of the partnership, with a prudent collection of their accounts and a well-managed receivership sale of their merchandise, would not pay forty cents on the dollar of their indebtedness. There intervened no extraordinary losses of merchandise or on collections, and no sufficient explanation is given of this great discrepancy in nine months of business life.

Shortly before the 2d day of October, 1896, the debtors planned to dispose of their partnership and individual property which would be liable to execution, by some arrangement the most favorable to themselves that could be devised in the then emergency of pressing obligations. They were in position to compel assent to their proposed action by those creditors whose debts they wished to secure or pay in preference to all others. Their voluntary action in the execution of their plan was assented to by the creditors preferred, during the consummation of the scheme, in such a way and with such inferential knowledge on the part of the creditors as to make them participants in the purpose and effect of the plan.

The evidence is voluminous, and the details of the various transactions complicated; but it is unnecessary to scan each of these details here as the leading purpose and object of the ultimate result run through each of the events, culminating on the 2d day of October, 1896. That purpose and result, if successful, disposed of their entire property, partnership and individual, so far as it could be reached by creditors, by paying some of them in full and leaving others without any prospect of a share in the insolvent estate.

It would not answer to make a general assignment. A provision of law (chap. 503, Laws of 1887) prevented a preference of over one-third in value of the assigned estate left after deducting the wages or salaries and the costs and expenses of executing such trusts. Therefore, the method pursued was adopted to achieve the result which could not apparently be otherwise accomplished.

Five judgments were confessed in favor of some of the defendants, amounting to $20,205.86, and executions immediately levied upon the personal property. Assignments of the best of the accounts for more than $20,000 were made to other defendants, and an omnibus assignment of all other accounts was made to secure any deficiency arising upon the collection of the confessed judgments, which omnibus assignment was unnecessary to secure those

judgment creditors, if the judgments were valid and not too great an amount of merchandise should be taken away under replevin actions, brought by vendors on the ground of the sales being made by the fraud of the debtors. To cover the whole and prevent the lien of attachments reaching any of the merchandise or choses in action, like a general residuary clause in a will to prevent intestacy as to any part, a friendly receivership suit was brought by two of the partners against the third, and a friendly receiver appointed by order of the court, the order so taking effect that the levies under the executions and the assignments preceded any right of the receiver.

The whole arrangement was in direct violation of the theory of the law that no disposition of the entire property of the insolvent debtor shall be made which prefers some creditors in full to the exclusion of all others, and which was adopted to accomplish the result of a general assignment with preferences in full, without being bound by the law in regard to such assignment.

There were transfers of individual property by two of the partners with some understanding as to continued possession by the debtors, and some other indications of fraudulent intent to which it is not here necessary to refer.

There is no doubt that a debtor honestly acting may pay any debt by the transfer, if necessary, of all of his property, he receiving full value for it. Tompkins v. Hunter, 149 N. Y. 117.

He may mortgage a part of his property to secure creditors, even if insolvent. Delaney v. Valentine, 154 N. Y. 692.

In the cases cited the debtor does not undertake to place all of his property, by any form of a transfer, beyond the reach of his creditors. Up to the point of action where, through one instrument or a series of instruments, he transfers all the property he has and prefers in full some creditors to the entire exclusion of all others, he has the right to honestly choose the creditors whom he desires paid, if the transaction does not involve a design of personal benefit to himself. If the transaction, however, has all the substantial legal effect of a general assignment to pay creditors, without some of its safeguards, the right of preference should be curtailed, and an attempt to avoid the prohibitions of the Assignment Act should condemn the validity of the evasive acts. I know of no case which upholds a transaction of the kind as legal. And, if such an evasive purpose, carried into action, is not in itself, as a matter of law, sufficient to avoid the acts of the debtor, it is still

important evidence upon the general question of an intent to hinder, delay or defraud. The unexplained change from abundant solvency to insolvency within a few months; the disappearance of books of account; the hurried events of the 2d of October; the unnecessary assignments of all remaining accounts in alleged protection of creditors who were amply secured; the collusive proceedings for the appointment of a receiver, who should hold in custody as an officer of the court all the property which might for any cause be afterwards exposed to attack, and which, if followed by a judgment and permanent receivership, took into its friendly embrace the rights of inquiry into the disposition of property apparently passed away between January and October, and the subsequent conduct of the parties in relation to the property, produce a conclusion of fraud which cannot be overcome.

The confessions of judgments and the transfers of accounts and other property should be declared fraudulent and void as made with intent to hinder, delay and defraud the creditors, and the property and its proceeds be freed from their apparent effect. The judgment, however, which should be rendered will not go to the extent of the relief demanded by the plaintiffs, who ask for the payment of their judgments and the appointment of a receiver to apply the property and its proceeds for that purpose. If the plaintiffs had levied executions before the appointment of the receiver, such relief as they now ask might be given. Matter of Thompson, 10 App. Div. 40; Myers v. Myers, 15 id. 448.

The plaintiffs here can only claim an equitable lien, such as is ordinarily impressed upon property by a favorable judgment, following the filing of a creditor's bill. Were there no receivership, and had the court not assumed jurisdiction of the property to the extent that a receiver representing all the creditors might claim, possibly such a lien as the plaintiffs desire might still be adjudicated, although in case of partnership property other considerations might prevent. The receivership in question has been confirmed by the appointment of an additional receiver who is acceptable to the unpreferred creditors. It would be a matter of very doubtful propriety to set aside the appointments of these receivers made by this court, in a collateral action, simply for the purpose of letting one set of creditors obtain a preference from which they are so strenuous in excluding others. O'Mahoney v. Belmont, 62 N. Y. 133.

Undoubtedly the court has power, as between the parties in an action commenced for that purpose, to set aside any judgment or

decree obtained by collusion or fraud. Dobson v. Pearce, 12 N. Y. 156; Wright v. Miller, 8 id. 9; State of Michigan v. Phoenix Bank, 33 id. 26.

And the court will assume power in such an action to set aside a fraudulent sale made by collusion of the receiver appointed in another action. Hackley v. Draper, 60 N. Y. 88.

Unless this court has power to do so, and sees equitable reasons to justify the exercise of that power, the orders of this court in the partnership action appointing the receivers should stand for the protection of the property which has been gathered within the grasp of the court, and no new receiver should be appointed in this action for the sole purpose of taking that property out of the possession of the other receivers and paying the plaintiffs' claims in full. The sole ground upon which a claim for such preference can be made is that of diligence in the pursuit of legal remedies uncovering the transactions in controversy. Such a consideration is not sufficient, and the plaintiffs will be rewarded to a substantial extent by the relief granted if they get their fair share of the insolvents' estate. The receivers, therefore, in the partnership action take the entire partnership property as it was before the confessions of judgment on the 2d of October, 1896, except that the proceeds are substituted as to property disposed of with their consent, and with all the rights of action which they as receivers would have to trace and follow the property of the partnership freed from the lien of the executions, assignments and transfers. But, as to the conveyance of the houses, which property the receivers do not take, the deeds are set aside as against the plaintiffs, with the usual judgment as in like cases. Costs are awarded in favor of the plaintiffs against the defendants, except the receivers.

Ordered accordingly.

MICHAEL DAVEY, Plaintiff, *v.* ANDREW DAVEY, Defendant.

(Supreme Court, New York Trial Term, February, 1898.)

Libel of a tradesman — Compensatory and punitive damages.

The printing and circulation by a person of a circular relative to his brother, who was conducting near by a business similar to his own, stating, among other things, "that an unscrupulous grocer of the

same name in the immediate vicinity or neighborhood advertises 'Davey's teas and coffees,' with a view to deceive the public, and may sell an inferior article," is libelous *per se*, and entitles the person libelled to compensatory and punitive damages.

ACTION to recover damages for libel published by defendant defaming plaintiff's business methods.

John T. Fenlon, for plaintiff.

Joseph I. Green, for defendant.

MCADAM, J. The law has always been considerate of the reputation of tradesmen (Newell on Sland. & L. [2d ed.] 192; Harman v. Delany, 2 N. Y. St. Repr. 898), and when one publishes of a tradesman or merchant any matter in relation to his calling which if true would render him unworthy of patronage, one is liable to an action, it being evident that the tendency of such a publication is to bring the subject thereof into disrepute and cause him injury. Brown v. Smith, 13 C. B. 596. Such publications are actionable without proof of special damage. Brown v. Smith, *supra*. The imputation imports damage, and if none is proved the jury may award substantial damages. The gist of the action is malice; yet the malice requisite is simply that implied by the law from the facts which give the right of action. Hartman v. Morning Journal, 46 N. Y. St. Repr. 181; Lewis v. Chapman, 16 N. Y. 372; Hamilton v. Eno, 81 id. 116; Byam v. Collins, 111 id. 143. The litigants are brothers. The defendant carried on the grocery and tea business at No. 2295 First avenue, and the plaintiff thereafter opened a similar business at No. 2331 First avenue. The defendant threatened that if the plaintiff opened a rival establishment near the defendant's store he would break up the business of the plaintiff; and after the latter opened the store the defendant caused to be printed and distributed broadcast 5,000 circulars, in which, after eulogistically describing the superiority of his wares and the advantage the public would derive by patronizing him, he said of and concerning the plaintiff and his business methods, "that an unscrupulous grocer of the same name in the immediate vicinity or neighborhood advertises 'Davey's teas and coffees' with a view to deceive the public, and may sell an inferior article." The words, though cunningly devised and put together, taken in their plain

and popular sense, that in which the readers were sure to understand them (Roberts v. Camden, 9 East, 96), bear the construction that the plaintiff was an unprincipled grocer (Cent. Dict.); that he was dishonest in his business, for he advertised Davey's teas and coffees with a view to deceive the public, and that he sold inferior articles, this being one of the characteristics of unscrupulous traders. While the defendant had the undoubted right to praise his own wares he had no right to single out the plaintiff, and not only denounce his wares, but in connection therewith impugn his business integrity. Such a publication could have but one purpose, namely, to injure the paintiff in his business, and it is, therefore, clearly libelous *per se*. Fowles v. Bowen, 30 N. Y. 20; Moore v. Francis, 121 id. 199; Chenery v. Goodrich, 98 Mass. 224; Mattice v. Wilcox, 71 Hun, 485; affirmed, 147 N. Y. 624. The plaintiff did not rest on the mere implication of malice, but went further and proved threats by the defendant to do him injury, thus indicating the presence of actual malice, or, as it is generally called, malice in fact. The defendant had no monopoly of the name "Davey," and other members of the family might lawfully use it. Faber v. Faber, 49 Barb. 357; Meneely v. Meneely, 1 Hun, 367; affirmed, 62 N. Y. 427; Helmbold v. Helmbold Co., 53 How. Pr. 453; Scott Co. v. Scott Co., 58 N. Y. Supr. Ct. 379. There was room enough in the neighborhood for two of that name, even in the grocery and tea business. The circular clearly points to the plaintiff and his store as the object of attack, and if there could be any possible question as to that, it is removed by the evidence (Van Ingen v. M. & E. Pub. Co., 14 Misc. Rep. 326; Griebel v. Rochester Printing Co., 8 App. Div. 450; Palmer v. Bennett, 83 Hun, 220); but the fact was so manifest that any point in respect thereto was waived at the trial. The plea that the defendant did not personally write the manuscript of the circular or put it in the hands of the printer is of no consequence, in view of the finding of the jury that it was published by his approval; and the evidence amply sustains the finding. The distinction between responsibility for acts of agents of merchants and for those of employees of a public newspaper who make publications in the performance of a duty enjoined on them by their principal, was clearly pointed out in the charge. Southern Ex. Co. v. Fitzner, 59 Miss. 581; 42 Am. Rep. 379. The rule is that "the amount of damages in an action for libel is peculiarly within the province of the jury. The jury may give nominal damages, or

damages to a greater or less amount, as they shall determine. The jury may accord damages which are merely compensatory, or damages beyond mere compensation, called punitive or vindictive damages, by way of example or punishment, when, in their judgment, the defendant was incited by actual malice, or acted wantonly or recklessly in making the defamatory charge." Holmes v. Jones, 147 N. Y. 59; Warner v. P. P. Co., 132 id. 185; Karwowski v. Pitass, 20 App. Div. 118. Indeed, the amount of damages rested largely in the discretion of the jury, who had the right, in addition to awarding compensation, to inflict damages for example's sake. Sedgw. Dam. (8th ed.), §§ 351, 352, 357; 3 Suth. Dam. 643. The defendant is a well-known merchant, having a large number of stores in different parts of the city, and his business position was such as to give great weight to his publications, particularly one concerning his brother, with whose character and business methods he was supposed to be entirely familiar. The finding in favor of the plaintiff is amply supported. The only question is whether the jury were guided by a sound discretion as to the damages, which they assessed at $3,250; and in this regard the verdict is open to inspection and revision by the court. Though there is no fixed measure of damages applicable, as they must vary to suit the circumstances of each case, they ought to be reasonably proportionate to the injury done. Newell on Sland. & L. (2d ed.) 910 et seq. The plaintiff's store was an inexpensive place, and $1,500 would be full compensation for any pecuniary loss entailed and at the same time ample punishment for the wrong, which, after all considered, consists of the defendant's malicious purpose more than anything else. The motion for a new trial will, therefore, be granted unless within ten days the plaintiff files a stipulation waiving the excess of damages over $1,500, in which case the motion will be denied. Potter v. Thompson, 22 Barb. 87; Sears v. Conover, 4 Abb. Ct. App. Dec. 179; Diblin v. Murphy, 3 Sandf. 19; Collins v. Albany & S. R. R. Co., 12 Barb. 492; Clapp v. Hudson R. R. R. Co., 19 id. 461.

Ordered accordingly.

ALBERT S. GALLUP, Plaintiff, *v.* SUSIE PRICE STERLING, E. K. ROSSITER and GEORGE M. PINNEY, Jr., as Executors of the Last Will and Testament of THEODORE W. STERLING, Deceased, Defendants.

(Supreme Court, New York Trial Term, February, 1898.)

1. **Sales — Action for the price — Contract making performance optional — Forfeit.**

Where a contract for the sale of a block of stock, to be paid for at times and in amounts stated, also provides that, if the vendee fails to pay the sums specified in the manner specified, he shall forfeit his stock, that it shall revert to the vendor, and that all claims against the vendee shall cease, no action for the price can be maintained against him for his failure to perform fully, as he has an option whether he will take the stock and pay the balance due upon the contract, or allow the stock to be forfeited and revert to the vendor.

2. **Same — Tender.**

A vendor cannot maintain an action for the price of stock where he is unable to tender it, because it is pledged to third persons.

MOTION for a new trial.

Latham E. Reed and Thaddeus B. Kenneson, for plaintiff.

Joseph H. Choate, for defendants.

DAVY, J. This action was commenced in 1890 against Theodore W. Sterling, and has since been revived against the present defendants, as his executors. The case came on for trial in December, 1897, and after counsel for the plaintiff had opened his case, the learned counsel for the defendants moved that the complaint be dismissed on the ground that it did not state facts sufficient to constitute a cause of action. The court granted the motion and took under consideration the plaintiff's motion for a new trial on all the grounds stated in section 999 of the Code of Civil Procedure. The rule is well settled that on a motion to dismiss the complaint on the ground that it does not state facts sufficient to constitute a cause of action, its allegations must be taken as true, and the sole question presented for the consideration of the court is whether it sufficiently states a cause of action. Tooker v. Arnoux, 76 N. Y. 397; Sheridan v. Jackson, 72 id. 170.

The action is upon a contract which was made between the plaintiff and Theodore W. Sterling. It states that the plaintiff is the owner of 850 shares of the capital stock of the Narrow Fabric Loom Company, of the city of New York, which the plaintiff has sold to Sterling for $15 per share, payable, as follows: One thousand dollars on the signing of the contract, and the further sum of $4,000 on or before three months from the date of the agreement; and it was further agreed that whenever the full sum of $5,000 and interest thereon shall have been paid by Sterling, the plaintiff was to assign and deliver to him 250 shares of said stock. And in case Sterling failed to pay the $4,000 and interest within the time specified, then the $1,000 paid, and the said 250 shares of stock were to be forfeited. The agreement further recites that Lester & Kane hold 600 of the said 850 shares of said capital stock as part security for the payment of the sum of $50,000 due from the company, which the plaintiff could not then deliver to Sterling. It is further stipulated in the contract that the remaining $7,750 shall be paid in three installments, at one, three and six months with interest from the date that the sum of $50,000 due Lester & Kane shall have been paid. The agreement also provides that "Should Sterling fail to pay the sums due from him at set forth in the contract he shall forfeit said stock, and the same shall revert to the plaintiff, and all claims against the said Sterling shall cease."

In construing this agreement we must give effect to the intent of the parties so far as such intent can be collected from the whole instrument, and is consistent with the rules of law. There is no mistaking the true meaning of the contract which is set forth in full in the complaint. The parties declare in language not capable of being misunderstood or misinterpreted that they have agreed that if Sterling shall fail to pay the $7,750, that title to the stock shall revert to the plaintiff and all claims against Sterling shall cease. "One of the rules of construction established is, that courts are to be governed by the intention of the parties, to be gathered from the language of the contract itself, and from the nature and circumstances of the case." Colwell v. Lawrence, 38 N. Y. 74; Cotheal v. Talmadge, 5 Seld. 554.

The contract, fairly construed, gives Sterling the option to determine whether he would take the stock and pay the balance due upon the contract, or allow it to be forfeited and revert to the plaintiff. There could be no breach of contract if Sterling did all that the contract required him to do, and if there was no breach, no action could be maintained for the contract price of the stock.

The plaintiff contends that the forfeiture and reverter of the stock provided for in the contract is in the nature of a penalty, and that the plaintiff has his election to resort to the penalty, or he can resort to any other remedy. The above rule does not apply to this contract because the agreement on the part of the plaintiff to accept the stock and release Sterling is absolute, and an action against the defendants in any form cannot be maintained. Sterling, by paying the $1,000 at the time the contract was executed, obtained the right to purchase 850 shares of the capital stock of the Narrow Fabric Loom Company, upon the payment of the sums agreed upon in the contract; whether he availed himself of this privilege or not was optional with him. He expressly stipulated, in case he did not take the stock, it should be forfeited, and the title to the same should revert to the plaintiff, and the plaintiff expressly agreed to accept the stock and to release Sterling from all claims upon the contract. The parties to this agreement had the right to insert such conditions therein as they might mutually agree upon or which they might consider necessary to protect their interests in the sale and purchase of the stock, and, when made, it must be construed and enforced like all other contracts, according to the expressed understanding and intent of the parties making it.

It was held in Manvel v. Holdredge, 45 N. Y. 151, that where the defendant, in consideration of the assignment to him by the plaintiff of an interest in a patent, bound himself to pay the plaintiff $1,000 before the end of the next year or reassign the patent, the year having elapsed without payment, and the defendant having, at the time the money was demanded, offered to reassign the patent, no action would lie against him to recover the $1,000, as there had been no breach of the contract. Allen, J., in speaking for the court, says: "By its terms he had the option during the whole year to pay the price, and upon his failure to do so within that time, the plaintiff's only remedy was to compel the reassignment, or in case of refusal, to recover whatever might be its value."

Taking into view all the provisions of the contract, it is clear that Sterling had the option to pay the remaining $7,750 with the accumulated interest thereon and take the balance of the stock, or to allow it to be forfeited and revert to the plaintiff; and it is also clear that the plaintiff agreed to accept the stock in case it was forfeited, and to release Sterling from all the obligations of the contract. This action, therefore, cannot be maintained for the reason

which I have already indicated, that there has been no breach of the contract. Assuming, however, that there was a breach, the plaintiff, even then, could not maintain this action. The rule is that where the right of action depends upon a condition precedent, its performance must be averred in the complaint. There could be no breach of the agreement to pay the money until the stock had been tendered. While the stock remained pledged to Lester & Kane no title passed to Sterling and no legal tender could be made to him. He may have had an equitable interest in the stock which could only be made perfect by the payment of Lester & Kane's demand, which he was not required to do by the terms of the contract. Sterling had no such interest or title to the stock as could be reached by his creditors by levy and sale under execution. The stock had been assigned and pledged to Lester & Kane as security for the payment of the $50,000, and they could retain and sell it if their lien was not satisfied.

The rule is well settled that a contract of sale and purchase does not pass the title when anything remains to be done by the seller to ascertain the identity, quality, quantity or price of the property. Burrows v. Whitaker, 71 N. Y. 296. The word "sold" in a contract of sale of chattels does not necessarily imply a change of title in the goods. Whether the contract changed the title to the stock, or only agreed to sell and deliver it thereafter, depends upon the whole of the language used in the contract. Anderson v. Read, 106 N. Y. 351.

No time was fixed for the payment of the $50,000 to Lester & Kane, at least so far as appears from the contract. It was problematical whether it ever would be paid. How was Sterling to know whether the stock had been reassigned unless he was notified by the plaintiff that it was in his possession, ready to be delivered upon the payment of the contract price. He was not bound to pay the price agreed upon for the stock without receiving it; and how can it be said that he refused to receive the stock and pay the money for it, when it never was tendered to him. The contract for the sale of the stock was executory, and, until the stock was released from the lien of Lester & Kane, the title to it could not be transferred to Sterling. The acts of the parties, in the delivery of the stock and the payment of the money, were to be simultaneous. Neither could put the other in default, except by performance or tender of performance on his part, and a recovery cannot be had for nonperformance of the contract unless an

actual performance or tender of performance is averred and proved by the party alleging a breach of the contract by the other. Lester v. Jewett, 11 N. Y. 453; Wheeler v. Garcia, 40 id. 589; Currie v. White, 45 id. 835; Sawyer v. Dean, 114 id. 477.

The plaintiff nowhere alleges, in his complaint, that he offered to transfer and deliver the stock upon the payment of the contract price. Ability and readiness to deliver was a fact material to be averred by the plaintiff in his complaint. Kein v. Tupper, 52 N. Y. 553.

It was held in Lester v. Jewett, 11 N. Y. 453, "when a party agrees in writing for value received to purchase stock at a future day at a price named, to entitle the vendor to recover upon such an agreement he must aver and prove tender and offer to transfer the stock to the purchaser."

In Hayden v. Demets, 53 N. Y. 428; Chief Judge Church, in speaking for the court, says: "The contract for the sale of the copper was executory. Although the plaintiff owned the specific copper sold, he also had other copper of the same quality, and until it was designated and set apart the title remained in him. Payment and delivery were to be simultaneous acts, and neither party could maintain an action against the other without performance or tender of performance on his part." He also says: "The setting apart and tender gave them a right of property in the copper, but not the right of possession without payment." There is a broad distinction betwen this case and the cases cited by the learned counsel for the plaintiff in which the terms of the forfeiture were entirely different. The motion for a new trial, therefore, must be denied, with $10 costs to the defendants.

Motion denied, with $10 costs to defendants.

Matter of the Accounting of ADOLPH LUDEKE, Assignee of EDWIN THRALL.

(Supreme Court, New York Special Term, February, 1898.)

1. Assignment for benefit of creditors — Compromise of claims — Liability for rent.

An assignee for the benefit of creditors cannot compromise a demand against the estate of the assignor; and hence where he has, against the protest of the assignor, although under the authority of

an ex parte order, secured the cancellation of a lease, under which the assignor was tenant, by the payment of a sum of money to the lessor, the payment must be disallowed upon his accounting.

Semble, that the lessor could prove the rent due up to the time of distribution and come in for his share of the assets, but whether he could claim the whole rent reserved by the lease for the entire term, quaere.

2. Same — Counsel fees.

The charges of an assignee for legal expenses should appear in his account, and be presented under oath, in the same manner as all other expenses of the trust.

ACCOUNTING of an assignee for the benefit of creditors.

C. H. Winsor, for assignee.

Eustis, Foster & Coleman, for assignor.

DALY, J. The creditors having been satisfied, the accounting of the assignee is with his assignor respecting the surplus coming to the latter. The chief contention arises over a payment of $2,500 made by the assignee in compromise of a claim for rent to accrue upon a lease. When the assignee took possession of the assignor's stock in trade on January 30, 1896, it was in the premises No. 3 Maiden Lane, of which the assignor had a lease with an unexpired term of four years and three months, at an annual rental of $8,000 to May, 1897, and $9,000 thereafter, the lessor having the right in case of nonpayment of rent to re-enter and relet on account of the tenant. The assignee went into the premises to prepare to dispose of the stock, and on February 29, 1896, agreed with the lessor to pay him $2,500 for the cancellation of the lease and release of rent after May 1, 1896. This was against the assignor's objection, and the assignee, without notice to him, obtained on April 15, 1896, an order of the court authorizing the payment. On April 15, 1896, the assignee disposed of the stock and vacated the premises, and paid rent for his use and occupation. The assignor objected to the allowance of such payment of $2,500 as a necessary or proper disbursement, and the referee disallowed it. The assignee claims that it was a payment for the benefit of the estate, as the lessor had the option to allow the premises to remain vacant and claim the whole rent reserved by the lease upon the authority

of the Matter of Hevenor (144 N. Y. 273). Without inquiring into the soundness of this contention, which was not before the court for decision in the case cited, and as to which see Journeay v. Brackley (1 Hilt. 447) and Matter of Link (14 Daly, 148), it is clear that the assignee could not by agreement with the lessor for the payment of a bonus for the cancellation of the lease make him in effect a preferred creditor to that extent, and so give him an advantage over the other creditors. Whatever claim the landlord had was only to a *pro rata* share of the estate. He could prove the rent due up to the time of distribution, and come in for his share of the assets. As was held in the Hevenor case (above), he could not, after re-entry and reletting for account of the lessee, come in with a claim for the loss upon such reletting. The order of the court permitting the assignee to make the payment as a compromise of the lessor's claim is no protection. The Assignment Act (Laws of 1877-8, § 23) permits the assignee, when authorized by the court, to "compromise or compound any claim or debt belonging to the estate of the debtor." The legislature, no doubt, advisedly refrained from permitting compromises of debts of the assignor, as one creditor might thereby obtain an advantage over the others, and secure by compromise a larger percentage and an earlier dividend than he would get if left to share with them. The court had no power to authorize the so-called compromise, it not being within the terms of the act; and the assignee had no power to make such a payment, it being in direct violation of the assignment, which directed that the estate should be distributed equally among the creditors of the assignor after payment of preferences named (Matter of Lewis, 81 N. Y. 424). The referee properly disallowed this expenditure and charged the assignee with it. A proportion of the rent of the premises was properly charged by the referee against the assignee who permitted his firm to sell their goods with those of the assignor on the premises. The claims of the assignee's counsel for professional services rendered to the assignee in the performance of his trust cannot be allowed as a claim for a distributive share of the surplus. It should have been included in the assignee's account among the expenses of his administration because the allowance is to the assignee as one of the expenses of the execution of his trust (Matter of Worthley, 10 Daly, 12). This includes the allowance to counsel for services upon the accounting, for in the final decree no more than what would be equivalent to taxable

costs in an action can be awarded to counsel (Matter of Rauth, 10 Daly, 52). The matter may be referred back to the referee to receive from the assignee a supplemental account for what he deems his counsel entitled to for the services rendered. Under the practice pursued in this case, the assignee has not been heard from as to the employment of counsel, the services rendered, the agreement for compensation, or the value of the work done, or the necessity for it. His charge for legal expenses should appear in the account and be presented under oath, as is done with respect to all other expenses of the trust. It may be proper to observe that I agree with the referee in considering excessive the charge of $800 for defending the estate from a claim of $950 for alimony by the wife of the assignor. The charge was substantially for arguments at Special Term, the Appellate Division, and the Court of Appeals. The referee has allowed $500. This I regard as still out of proportion to the amount involved and the work done, and should be diminished in view of the fact that the counsel had an assignment of the fund in dispute from the assignor before the last argument, and was, therefore, contending in his own interest, as well as on behalf of the estate. The referee has also made what seems to be a large allowance — $400, for legal services in making schedules, for final accounting, and before the referee on objections of the assignor, and before the Supreme Court. Allowances for counsel fee in preparing schedules, or for general advice and consultations are ordinarily disallowed (Levy's Accounting, 1 Abb. N. C. 182; Matter of Wolf, 13 Daly, 481; affirmed, 102 N. Y. 741, as Matter of Gomprecht). For what should be allowed for counsel where no complicated questions involved in the trust or actual litigations, see Matter of Johnson (10 Daly, 123). The court will make no distinction between legal and other expenses of the trust, and will make no special order allowing counsel fees. The assignee is to charge them in his account, and they will be passed upon in his final accounting (Matter of Thomas, 5 Abb. N. C. 354, and note page 355). The report of the referee fails to show compliance with Rule 3 of Special Assignment Rules. Report referred back.

Ordered accordingly.

Matter of A. E. Chasmar & Co., a Corporation.

(Supreme Court, New York Special Term, February, 1898.)

Corporations — A receiver is not bound to complete its contracts — Rights of special and general creditors.

The receiver of an insolvent corporation is not bound to complete its contracts, but if he does so, without objection from any party in interest, the cost of completion is properly chargeable to special creditors who have an assignment of, or a lien upon, the proceeds of the contract; and the cost, together with a proportionate share of the expenses of the trust, should be deducted from the proceeds before the balance is paid over by him, instead of deducting it from the general funds of the trust.

The cost of the completion of the contract would, in any event, be the measure of damages for the nonperformance by the corporation of its contract and the special creditors can prove that cost as a claim against the general fund and share pro rata with other creditors.

Accounting of receiver. Petition to compel him to turn over certain moneys and property.

Charles Strauss, for receiver.

Ira G. Darrin and Samuel Hoff, for creditors.

Daly, J. In proceedings for the voluntary dissolution of the corporation known as A. E. Chasmar & Comapny, a receiver was appointed, who found in possession of the concern certain printed sheets and plates to make up a book called "The World's Railway." The corporation had agreed to do the presswork of the book under a contract with one Winchell, who furnished the paper and plates and assigned to the corporation as security the subscriptions he had procured for the work. Before the appointment of the receiver the corporation had assigned the contract with Winchell, and all its claims for presswork done and cash advanced thereunder, and all the said subscriptions, to another concern, known as Molleson Bros. Co., to secure the latter for cash advanced to the full amount of the sum named. It had also agreed with two parties interested to deliver the book to subscribers, collect the subscriptions, and divide them among the parties entitled thereto. When the receiver

took possession, the corporation had not completed the presswork upon the book, and this the receiver undertook to do; also to prepare an index for it, to bind it, and to deliver it to subscribers, all with the consent of the parties interested. He collected $3,668.70 from subscribers and had on hand 1,325 unbound copies, when the parties in interest applied to the court for an order directing him to deliver the cash and books to A. E. Chasmar, whom they had appointed trustee to market the book and divide the proceeds among them. The receiver claimed to be allowed out of his said collections his expenses in completing and marketing the work, his commissions on the sum collected and also upon the value of the books on hand, his counsel fees, and the expenses of the proceeding. The referee to whom the claim as well as the general account of the receiver were referred by the court has allowed the receiver for the expense of completing and delivering the work to subscribers $807.35, leaving a balance of $2,861.35, out of which he allows commissions on $3,668.70, as well as on $1,000, the value of the unfinished books; $150 counsel fees, and one-sixth of the expenses of the proceeding, substantially the proportion which the fund in dispute bears to the whole amount chargeable to the receiver. The expense of completing the books and delivering them was undertaken by the receiver without objection from any of the parties interested, and would have to be incurred by them in any event, as the contractor had failed to perform his contract. There is no force, therefore, in the contention that the shares of the parties interested should not be diminished by such expense. The receiver was not bound to complete that contract any more than a general assignee is required to perform the contracts of the assignor (Matter of Adams, 12 Daly, 454; 15 Abb. N. C. 61; 1 Am. & Eng. Enc. Law, 876). It could not be assumed by the parties interested that this work would be undertaken at the expense of the general creditors, and be paid for out of the general fund. It is suggested that the general fund was benefited by being relieved from the claim for damages for nonperformance of the contract by the corporation. If such a claim for damages is provable against the estate, and it may be (People v. St. Nicholas Bank, 151 N. Y. 592), it still exists, and the measure of damages is the cost of completing the work. The parties interested may prove the claim, and will be entitled to share *pro rata* with other creditors. They cannot collect the whole, as if it were a preferred debt,

and yet this is what they are in effect seeking to do in this proceeding. As to the cost of delivering or marketing the books, that is conceded to be a proper charge, and should be allowed at the sum fixed by the referee. The items going to make up the charge are objected to by some of the parties interested and approved by others. The receiver was required to use his best judgment in handling the matter, and appears to have acted in good faith. The referee's finding on that question should not be disturbed. The allowance of the counsel fee and a proportionate part of the expenses of the accounting was proper. This expense seems to have been necessarily incurred by reason of the dispute between the parties. I do not see, however, how the receiver is entitled to any commissions upon the books which were not sold by him. They were disposed of by the parties interested at their own expense; he has no right to the proceeds, and consequently no claim for commissions. An order accordingly may be settled upon notice.

Ordered accordingly.

MATTHEW S. MOLONEY, Jr., Plaintiff, *v.* CHARLES E. TILTON et al., Defendants.*

(Supreme Court, New York Special Term, November, 1897.)

Declaration of trust — Failure to inform the beneficiaries — Violative conveyance by the settlor — Knowledge of grantee — Liability for rents and profits.

Where a person duly executes and records a declaration of trust, which, however, reserves to the settlor a power to sell, invest and reinvest, stating that he, for valuable considerations paid and received, will hold certain premises, purchased by him, in trust to pay the income to two persons living with him, a mother and son, during their joint lives, and that of the survivor and, upon the death of the latter, will convey the premises, or pay the proceeds of their sale, to the issue of the son, an absolute conveyance of the premises, made by the settlor after his constant retention of the declaration of trust and his failure to inform the beneficiaries of its existence during an ensuing period of sixteen years, to a third person, who is fully advised of the existence of the trust and knows of the intention of the

*Received too late for insertion in proper place.— [Reporter.

settlor to divert the proceeds of the conveyance from the trust purposes, is void as to the son and he may, upon learning of the existence of the trust, compel the grantee of the settlor to convey to a new trustee, who shall hold the premises for the purposes of the trust, and may also compel the grantee to account for the rents and profits of his occupation.

ACTION to have it declared that the defendant holds certain property impressed with a trust, and to require him to transfer the same to a trustee to be appointed by the court.

Esek Cowen, for plaintiff.

Nelson S. Spencer, for defendant Tilton

BEEKMAN, J. On or about April 28, 1864, one Matthew S. Moloney purchased from one Philip Milspaugh the premises known as No. 81 Amity street in this city. Immediately upon the delivery of the deed which bears the above date, Moloney executed a declaration of trust with respect to said property, out of which this controversy arises. The instrument bears even date with the deed from Milspaugh, and recites that conveyance. By its terms Moloney declares that in consideration of the sum of $6,500 to him in hand paid, it is not stated by whom, the receipt of which he acknowledges, and for divers other good considerations to him moving, he holds and will at all times hold and stand possessed of the property in question, upon the following uses and trusts, namely: to collect the rents, issues and profits and after payment of taxes, assessments, repairs, insurance and all other necessary and lawful expenses, to apply the net income to the joint use of Mrs. Nancy L. Blackburn and her son, Charles Blackburn, during their joint lives and the life of the survivor, and upon the death of the survivor in trust to grant and convey said house and lot or pay over and transfer the proceeds thereof to the issue, if any, of said Charles Blackburn, then living. If there should be no such issue then living, the settlor reserves the estate to himself, if he should then be living, in default of which, however, certain limitations over are made, to which it is unnecessary here to refer. A power of sale is created in the following words: "And upon the further trust, in case I or my successor or successors shall deem it advisable to sell said house and lot, either at public or private sale, and invest the pro-

ceeds in bond secured by mortgage or improved unincumbered real estate or in United States or state stocks or securities, and the same to reinvest." The settlor reserved from the grant during his life-time, for his own use and benefit, or that of such person as he might from time to time appoint, two rooms, which he designated, and part of the cellar and back yard. In case of his death before the completion of any of the trusts so created, he directs his successor to be appointed by the Supreme Court of the state of New York on the application of any person interested. The instrument was signed and sealed by the settlor, in the presence of a subscribing witness, was acknowledged by him before a commissioner of deeds on May 23, 1864, and on the same day was recorded in the office of the register of the city and county of New York.

On or about July 31, 1880, Moloney executed and delivered to the defendant Charles E. Tilton a deed bearing date on that day, by which, in consideration of the sum of $8,000, he assumed to convey said premises to Tilton. This instrument is in form a full covenant warranty deed, and purports to be a conveyance of an absolute title by the grantor in his own right. No reference of any kind is made to the declaration of trust or to the power of sale therein, nor is the grantor described as trustee. In short, the deed is exactly what it should have been had the trusts above referred to never been created. Tilton thereupon took possession of the property, and has continued to exercise rights of ownership over it ever since, claiming title thereto under the above deed.

On February 1, 1896, Moloney died, and shortly thereafter this action was instituted by Matthew S. Moloney, Jr., who, under a change of name, is the same person described in the declaration of trust as Charles Blackburn, one of the beneficiaries thereunder. The theory of the action is that the conveyance made by Moloney to Tilton was in contravention of the trust, of which fact Tilton was affected with notice; that the latter should be decreed to have held the property upon the trusts declared; that a new trustee should be appointed, to whom Tilton should be required to transfer the property, and also to account for the use and occupation, rents, income and proceeds of the same since he took possession in 1880.

It appears from the proofs that for some time after the purchase of the property by Moloney and the execution of the declaration of trust he occupied the premises with Nancy J. Blackburn and Charles Blackburn, then a child of about seven or eight years of

age. On August 11, 1864, a little over two months after the execution of the trust instrument, Moloney married Mrs. Blackburn, and thereafter the boy Charles, the plaintiff in this action, assumed the name he now bears and was treated by the elder Moloney as his son. It is unnecessary to inquire any further into their relationship. It is sufficient for the purposes of this action that it clearly appears from the proofs that the plaintiff and the Charles Blackburn referred to in the deed of trust as the son of Nancy J. Blackburn are one and the same person.

It now becomes necessary to consider the grounds on which the defendant Tilton resists this action. It is contended, first, that the declaration of trust was inchoate and incomplete, and that the proofs are insufficient upon which to rest a finding that the settlor intended that the deed should take effect and become operative upon its execution. In support of this contention the defendant largely relies upon evidence tending to show that Moloney, the settlor, kept all knowledge of the trust from his beneficiaries, and apparently dealt with the property as if it were his own. It is certainly true that the plaintiff never knew of the trust until the year 1895, when the defendant sought, through his intervention, to obtain a confirmatory deed from the father. That the settlor had deliberately adopted a policy of silence upon the subject towards his beneficiaries is sufficiently indicated in the letter which he wrote in 1880 to the defendant Tilton, when a sale of the property was under consideration, which contains the following statement: "No one in our family knows of this declaration of trust of mine, and never will if the sale is made before I die." Accompanying this letter were what the writer described therein as the "title papers in full" of the property, and among them was the original declaration of trust. I shall have occasion to refer to this letter in another connection, but so far as it is relied upon as evidence of an original unexecuted intention to create the trust, it is of little value. Assuming that a declaration, made by a person situated as the settlor was with respect to this property some sixteen years after the execution of the deed, is competent evidence against those claiming under it, the declaration so made is quite consistent with the integrity of the trust in its original creation. The settlor does not repudiate it as an imperfect act. On the contrary, he transmits the original deed embodying the trusts declared with his other muniments of title for the use of the purchaser.

It will be remembered that the declaration of trust contained

a full power in trust to sell for purposes of investment, so that considering this with the fact that the declaration had been recorded and was transmitted to the defendant Tilton, as a paper through which title was to be made, there can be little doubt that Moloney expected to tender a title under this deed, but with the further intention, which he communicated in his letter to Tilton, of dealing with the proceeds in a manner which in contemplation of law amounted to a breach of trust. It becomes important in this connection to note the fact that Moloney and Tilton were intimate friends, and had also some business relations with each other. When the above letter was written, Tilton was endeavoring to sell the property for Moloney. His own purchase of it was an afterthought, and was subsequently agreed upon, apparently to oblige Moloney, when it was found difficult to effect a sale owing to the dullness of the real estate market. These facts serve to explain the frankness with which the writer disclosed his attitude towards the trust and his purposes with respect to it.

We have then an instrument expressing in appropriate form all of the elements of a perfectly valid trust. It was duly executed, acknowledged and recorded. It was retained by the settlor for sixteen years after it had been executed, and was then turned over with other papers relating to the title, to a third person for the use and benefit of the person to whom the property might be sold. These acts are hardly consistent with the theory of an unexecuted purpose. Had the trust been created by deed to some other person than the grantor, a very different case would have been presented. In such a case the continued possession of the deed by the grantor, coupled with no other proof of delivery than such as might be presumed from the record, would have raised a serious question with respect to the legal inception of the trust. But upon the facts of the case as they are, the settlor was the natural and legal custodian of the paper. He was himself the trustee charged with the duty of executing the trust, and the instrument which declared it was properly retained by him in his own possession. What he did was quite sufficient to evidence an executed intention to create an irrevocable trust. The act of recording the paper can hardly be explained on any other theory. It was a step taken for the purpose of advising all who might deal with him with respect to the property that he had impressed it with the trust which he had declared, and that his rights and obligations, thereafter with respect to it, were such as were set forth in the instrument. Con-

sidering the reasons which usually prompt people to record their deeds, the act in this case was hardly called for as a protective measure; so that we may, with a greater degree of certainty, impute to it a purpose to furnish evidence, in a physical and permanent form, of the execution of his intention to create the trusts which the instrument expressed. That intention is to my mind further emphasized by the manner in which the declaration of trust is linked with the original purchase of the property. It is made to bear even date with the deed from Milspaugh to Moloney, which it also recites, and the inference from this is quite justifiable that the property was purchased in furtherance of the settlement and in pursuance of a preconceived plan to create it, which was consummated when the declaration of trust was executed. The previous relations between Moloney and Mrs. Blackburn, their marriage about three months after the date of the execution of the deed and the paternal attitude which he assumed towards the plaintiff, are facts which also suggest the existence, at the time of the execution of the deed, of a motive to provide for her and her child so compelling in its character as to leave little doubt of his intention that the trust was to take effect without reservation and as a completed act.

The counsel for the defendant lays stress upon the fact that the settlor refrained from informing the beneficiaries of the existence of the trust, and apparently dealt with the property as his own. But this circumstance is shorn of whatever value it might otherwise have had when the situation of the parties towards each other is considered. Both of the beneficiaries were living with Moloney, and were being supported by him, and for a portion of the time they all occupied the premises in question together. In a certain sense, perhaps, they were thus receiving the benefits of the trust, in an indirect way to be sure, but at least to an extent which was doubtless sufficient to satisfy a mind not concerned with the niceties of legal obligation towards those so closely related to him, that the application of the income of the property to the use of the beneficiaries was sufficiently made in the support which he gave them. Why he should have concealed from them the existence of the trust it is useless to inquire. Personal peculiarities of this kind are not so infrequent as to leave us at a loss for a conjecture. Whatever may be the inference which can be legitimately drawn from this attitude which was thus assumed towards the beneficiaries of the trust, it is not sufficient to overcome the conclusion which

the other facts proven in the case clearly justify, that the trust had a valid inception.

The law applicable to the case is quite well settled. In the case of Martin v. Funk, 75 N. Y. 134, the whole subject of trusts resting on the declaration of the settlor is elaborately considered. Church, Ch. J., in delivering the opinion of the court, says (p. 138): "Enough must be done to pass the title, although when a trust is declared, whether in a third person or the donor, it is not essential that the property should be actually possessed by the *cestui que trust*, nor is it even essential that the latter should be informed of the trust. In Milroy v. Lord, 4 De Gex, F & J. 264, Lord Chief Justice Turner, who adopted the most rigid construction of trusts, in delivering an opinion against the validity of the trust in that case, laid down the general principles as accurately perhaps as is practicable. He said: 'I take the law of this court to be well settled, that in order to render a voluntary settlement valid and effectual the settler must have done everything which, according to the nature of the property comprised in the settlement, was necessary to be done in order to transfer the property, and render the settlement binding upon him. He may, of course, do this by actually transferring the property to the persons for whom he intended to provide, and the provision will then be effectual, and it will be equally effectual if he transfer the property to a trustee for the purposes of the settlement, or declare that he himself holds it in trust for these purposes, and if the property be personal, the trust may, I apprehend, be declared either in writing or by parol.'"

In the case of Martin v. Funk a deposit was made in a savings bank by the depositor in terms in her own name in trust for another. She never informed the *cestui que trust* of the fact, retained the bank-book in her possession, and died leaving the account open. The court upheld the transaction as a valid declaration of trust. The authority of this case has not been overthrown. Cunningham v. Davenport, 147 N. Y. 43. To be sure, the question of intent is always open to inquiry, and, while the presumption is that the settlor intended that which his declaration and acts naturally import, it is not a conclusive presumption, but may be rebutted by proof of other acts and circumstances which are inconsistent with the existence of any such intention. But it must be remembered that the ultimate fact to be determined in all such cases is what was the intention of the settlor at the time of the alleged creation of the trust, and the court should be cautious in accept-

ing subsequent acts in apparent derogation of the trust as controlling evidence of a lack of intention to give complete inception to a trust which has been explicitly stated.

In the case at bar the weight of evidence is with the plaintiff, and the establishment of the trust must be considered as quite free from reasonable doubt. But, it is further contended by the defendant that, assuming the trust to have been validly created, the transfer to the defendant may be upheld as a valid execution of the power of sale contained in the instrument. The power so reserved or conferred was a power in trust, capable of being legally and efficiently exercised only for the purposes of the trust; and while a *bona fide* purchaser for value taking title under such a power is not bound to see to the application of the proceeds, yet if he has knowledge of an intended conversion of the same in whole or in part by the trustee, or that the power is being exercised by the trustee in fraud of the trust, he is not in the position of one who purchases in good faith, and the property, notwithstanding the conveyance, still remains in his hands subject to all of the trusts which were originally impressed upon it. The difficulty with the contention of the defendant is that the proofs disclose that he did have knowledge of Moloney's intention to appropriate the proceeds of the sale in a manner which was in derogation of the trust. The agreement between them, which was carried out, was that of the $8,000 which the defendant Tilton was to give for the property, $2,000 were to be paid by the cancellation of two notes upon which Moloney was individually indebted to Tilton, and the balance was to be paid in cash on Moloney's draft for the amount. The correspondence between them also shows that Moloney expected to use this balance for purposes quite without the purview of the trust. In fact, the statement contained in his letter of May 1, 1880, to the defendant before mentioned, namely: "No one in our family knows of this declaration of trust of mine, and never will, if the sale is made before I die," was such a clear intimation of a malign purpose as to deprive the defendant of any refuge from the consequences of the trustee's illegal action.

It is claimed by the defendant that he never actually knew of the trust or of the contents of this letter until the defect in his title was brought to his attention in 1895. It appears from the letter itself that it was sent with the title deeds when the latter were transmitted to the defendant. The package in which they were inclosed was received by a person who represented him when

he was away from the city. The defendant says that knowing the papers referred to the property he did not examine them when informed of their arrival, and has no recollection of having read the above letter, which accompanied them; that when he had agreed to purchase the property he sent the package to his attorney with a request for advice respecting the title; that he received the response that Moloney could give a good title to the property, and that he thereupon closed the transaction.

There seems to be no doubt about the fact that the deed creating the trust was among the papers handed to the attorney, and the inference from Tilton's testimony is that the letter of May 1st was also among them; although upon that assumption it is difficult to understand why the attorney did not advise the defendant of the risk he was taking in dealing with a trustee who revealed a purpose of acting in disregard of his duties. But if this letter was not transmitted to the attorney with the papers which it originally accompanied, the inference is fair that Tilton had separated it from the others, and the probability that he read it and knew its contents when it was received is thus increased. While I do not question his veracity when he says that he does not remember having read it, my conclusion is that it was read by him upon its receipt, but that he has forgotten it. As he did not entertain the idea of purchasing the property himself when it was received, its contents would not have made so strong an impression upon his mind as would otherwise have been the case had the element of personal interest been present.

By whom the deed of the property under which the defendant claims was drawn does not appear. It seems unlikely that his attorney prepared it, as it is, in form, a full covenant warranty deed made by Moloney in his individual capacity, and contains no reference whatsoever, directly or indirectly, to the trust. It does appear that the transaction was closed by the parties themselves without the intervention of any attorney. The most probable explanation of the matter is that the attorney's advice was based upon the existence of the power of sale contained in the declaration of trust, but was taken by Tilton, assuming his actual ignorance of the trust deed, to mean that Moloney individually had a good title which he could convey. If this was the fact, it was certainly a most unfortunate play of cross purposes for the defendant. But even accepting the defendant's version of the facts, they are not sufficient to relieve his title from attack. He had constructive

notice of the trust from the record; he was also affected with the notice which his attorney acquired from the original deed of trust which had been placed in his hands, and he was in possession of the letter of May 1st, which accompanied the title papers. He had thus, apart from the question of constructive notice, in his own hands sources of information which would have fully revealed to him the infirmities of the title he was about to take. If he did not see fit to examine them, it was a misfortune from the consequences of which he cannot reasonably be expected to be relieved.

Indeed, in taking the alternative position that the sale to the defendant may be sustained as a valid execution of the power, he must postulate the existence of the trust itself, and in so doing must logically accept the consequences of his knowledge of facts disclosing an actual or proposed violation of the trust by the trustee with whom he was dealing. Knowing as he did that Moloney proposed to deal with the proceeds of the sale in a manner which was in fact in contravention of the trust, he cannot avoid the legal consequences flowing from such knowledge by any plea of actual ignorance of the trust deed when he seeks to vindicate his title by claiming under it. The conclusion must be that there was no valid execution of the power.

The defendant has also pleaded the Statute of Limitations. The evidence, however, shows that he was actually residing out of the state at the time of his purchase of the property, and has continued to do so down to the present time. The plea is, therefore, ineffectual as a bar to the action. There must be judgment for the plaintiff, with costs. If an accounting for the rents and the use and occupation of the property is also sought, the principles upon which the account is to be taken and stated will be determined on the settlement of the decision and interlocutory judgment.

Ordered accordingly.

MAURICE STRANSKY, Plaintiff, *v.* ABRAHAM HARRIS, Defendant.

MAURICE STRANSKY, Appellant, *v.* NATHAN WEICHMAN, Respondent.

(Supreme Court, Appellate Term, February, 1898.)

1. Bail — Surrender of principal — Issue of new execution.

The sureties on an undertaking upon an order of arrest may surrender the defendant, their principal, at any period before the expiration of the

time to answer in an action brought upon the undertaking, or afterwards where the time to answer has been extended by the court; but where they have failed to do so, as alleged, because they were ignorant of their rights, the court has no power, after the lapse of five months from the time when judgment was recovered against them in an action upon the undertaking, to direct the plaintiff, upon the motion of one of them, to issue a second execution against the person of the defendant in order to lay a foundation for his surrender in exoneration of the surety.

2. **Same — Default — Supplemental answer setting up matters subsequent.**

While the court has power to open the default of a surety and to extend his time to surrender his principal, it should not give him general authority to serve an amended or supplemental answer "setting forth such matters as may have occurred in said action," as under such a permission he might plead matters not yet in existence and which might never occur.

Stransky v. Harris, 22 Misc. Rep. 15, reversed.

APPEAL from an order of the General Term of the City Court of the city of New York, affirming an order made at a Special Term of said court.

In the action first above mentioned, the plaintiff obtained an order of arrest against the defendant, who gave the required bail and was discharged from custody. Thereafter such proceedings were had that judgment was recovered against the defendant, and after an execution had been duly issued against his property and returned unsatisfied, an execution against his body was placed in the hands of the sheriff, who, after the lapse of sixty days, returned it unexecuted with the statement, "not found." Thereupon an action was begun by the plaintiff against the sureties on the bail-piece, being the action secondly above mentioned. The defendant-respondent answered, but, having made default when the case was called for trial, an inquest was taken and judgment was entered against him. An execution was immediately issued, under which a levy was made by the sheriff on the property of the respondent. A motion was then made by him that his default be opened, which was granted on the payment of $15 costs, the court further directing that the judgment should stand as security, and setting the case down for trial on a specified date. The case appeared on the Trial Term calendar for that day, when the respondent endeavored to obtain an adjournment, in which, however, he

was unsuccessful. It also appears that the $15 costs, imposed as above stated, had not been paid. The only official record of what took place on that occasion is found in the stenographer's minutes, where it is stated that the defendant in open court refused to comply with the order opening the default, and consented that the judgment already recovered should stand, and that the sheriff might proceed under the execution issued thereon. Subsequently an agreement was entered into between the respondent Weichman and the plaintiff, in pursuance of which the execution was withdrawn and payments were made from time to time by Weichman on account of the judgment, which has thus been reduced to about one-half of its original amount. After a lapse of five months from the recovery of the judgment, the respondent made a motion at a Special Term of the City Court for the purpose of securing relief from the judgment, on which motion the order appealed from was made. By the terms of such order the plaintiff was directed to issue a new execution against the body of the defendant Harris within three days after a service upon him of a copy of the order. It was then provided that the respondent should be permitted thereafter to surrender Harris to the sheriff, and his time to do so was extended three days after the issuing of such execution; that the respondent be permitted to serve an amended or supplemental answer within three days after such surrender "setting forth such new matters as may have occurred in said action;" that the judgment on default, taken against the respondent, be opened on the payment to the plantiff of $50 costs; that the cause be set down for trial on a specified date, and that the respondent have leave to apply to the court to exonerate him as surety on the bail-piece. The ground on which the equity of the motion was placed is that the respondent was ignorant of the fact that he could have surrendered Harris and thereupon have obtained an order of exoneration after the action on the undertaking had been commenced, and that he was the victim of his former attorney's ignorance or neglect. It was also further claimed that the plaintiff's attorney withheld the address of the defendant Harris from the sheriff, and thus prevented his being taken under the execution, for the purpose of bringing an action on the undertaking and collecting the judgment from the sureties.

Jesse S. Epstein, for appellant.

Charles I. Schampain, for respondent.

BEEKMAN, P. J. The court below erred in directing the plaintiff to issue a new execution against the person of the defendant Harris. The object of the direction was to lay a foundation for the surrender of their principal by the sureties on the undertaking in their own exoneration. Such a surrender may be made before the expiration of the time to answer in an action on the undertaking, or afterwards where the time to do so has been extended by the court. §§ 591 and 601, Code of Civil Procedure.

The manner in which such a surrender must be made is prescribed by section 592 of the Code. The sureties must take the defendant to the sheriff, and require him, in writing, to take the defendant into his custody. They must at the same time deliver to the sheriff a certified copy of the undertaking, whereupon it is made the duty of the latter to " detain the defendant in his custody thereupon, as upon the original mandate," and to acknowledge the surrender by a certificate in writing.

The original mandate in the case at bar was the order of arrest, so that the effect of any surrender, which might be allowed here, would be that the sheriff must resume the custody of the defendant Harris because of the original order of arrest, and his authority for so doing would rest upon the demand of the sureties, and the papers required to be delivered to him at the time of the surrender. Section 110 of the Code provides that " A person arrested by virtue of an order of arrest, in an action or special proceeding brought in a court of record; or of an execution issued upon a judgment rendered in a court of record; *or surrendered in exoneration of his bail;* must be safely kept in custody in the manner prescribed by law, and, except as otherwise prescribed in the next two sections, at his own expense, until he satisfies the judgment rendered against him, or is discharged according to law."

It may well be that, after the defendant is so surrendered and held by the sheriff, it may become necessary at some time for the plaintiff to issue a new execution against the body of the defendant in order to avoid the loss of his remedy and the discharge of the defendant under section 572 of the Code; but what have the sureties to do with that? They have secured immunity from any liability to the plaintiff by virtue of the surrender of their principal, followed by an order of exoneration by the court. They are no longer concerned about the fate of their former principal, but have become strangers to the entire matter, and whether the defendant is thereafter to be held or discharged is a matter in which

propose to discuss the question further than to say that, as the only possible ground for moving in the first action was to give support to the direction that a new execution issue and as we are unable to sustain the order in that regard, the motion cannot be entertained in its present form.

The respondent should, however, have leave to renew his motion for the opening of the default and for an extension of time within which to surrender his principal. In granting such leave, while we do not wish to interfere with the prerogative of the court below to exercise its own discretion in the matter, we think it not improper to suggest that the consent which the respondent gave in open court that the judgment against him should stand and the agreement which he thereafter made with the plaintiff, in consideration of the withdrawal of the levy upon his property, to pay the judgment by installments, which agreement has been practically executed, are at least deserving of weighty consideration. Doubtless the respondent has been aggrieved, but his situation seems largely the result of what would appear, upon the facts before us, to have been the negligence of his former attorney in not advising him, as soon as the action on the undertaking was brought, that he had a right to surrender his principal and obtain an order of exoneration.

The claim that the plaintiff's attorney, in the original action, unlawfully interfered with the taking by the sheriff of the defendant Harris on the body execution, on which the General Term of the court below laid considerable stress in sustaining the order, was not pleaded by the respondent, nor strange to say, does the order appealed from give him leave so to do. Broad as was the authority to amend which was attempted to be conferred, it fell short of sanctioning the interposition of this defense.

It follows from what has been said that the order must be reversed, and the motion denied, with costs to the appellant, but with leave to the respondent to renew the motion to open the default and for an extension of time within which to surrender his principal, on payment of such costs.

GILDERSLEEVE and GIEGERICH, JJ., concur.

Order reversed and motion denied, with costs to appellant, with leave to respondent to renew motion to open default and for extension of time within which to surrender his principal on payment of costs.

FRITZ MORRIS, Respondent, *v.* GEORGE MURRAY, Appellant.

(Supreme Court, Appellate Term, February, 1898.)

1. Services — Charge of court.

Where the main issue in an action for services is whether the plaintiff gave credit to the defendant or to an association of which he was the manager, a charge to the jury that, if the defendant said "You (the plaintiff) are to look to me for pay," the plaintiff is entitled to a verdict, does not limit the jury to a consideration of these words only where the court subsequently calls their attention to the other evidence in the case and directs them to determine the original agreement between and the intention of the parties.

2. Evidence — Objection to a paper.

An objection, made to the admission of a telegram as incompetent, does not sufficiently raise the objections that the original was not produced, and that no proof had been made that the telegram had been transmitted to the party sought to be charged.

Morris v. Murray, 22 Misc. Rep. 1, affirmed.

APPEAL by the defendant from affirmance by the General Term of the City Court of a judgment in favor of the plaintiff.

Herbert C. Smyth, for appellant.

Harold Nathan, for respondent.

BEEKMAN, P. J. We are limited on this appeal to a consideration only of questions of law raised by the exceptions of the appellant. Ebenreiter v. Dahlman, 19 Misc. Rep. 9. On the close of the case, a motion was made to dismiss the complaint on the ground that the plaintiff had failed to make out a cause of action, and upon the denial of the motion the counsel for the defendant thereupon asked the court to direct a verdict for the defendant, which was also denied. Both rulings were excepted to. The only question, then, arising upon the facts which we are at liberty to consider is whether there was an absence from the case of any evidence tending to establish an essential element of the cause of action set forth in the complaint. Sweetzer v. Cameron, 3 Misc. Rep. 71; Eckensberger v. Amend, 10 id. 145. After a careful examination of the record we are unable to find that such was the case. There was enough proof to require the submission of the

case to the jury, and the motion to dismiss was properly denied. The issue was a very simple one. The contention of the plaintiff was that he did certain work for the defendant under his employment and on his individual promise to pay for the same. The defendant, on the other hand, claimed that he was a mere agent for the Long Beach Association, a fact which was well known to the plaintiff, and that the latter dealt with him as such agent and undertook the work solely for the Long Beach Association and on their credit only.

On the trial the plaintiff testified to the following conversation which he states took place at the time the contract was made: "I asked Mr. Murray (the defendant) for whom I was doing that work and to whom I was to look for my pay, and he told me I was doing it for him and that he would pay me." This was unequivocally denied by the defendant. Considerable testimony was taken on both sides with respect to the facts and circumstances surrounding the parties at the time the work was undertaken, and also with reference to their subsequent acts for the purpose of affording corroborative proof of the claims respectively made by them. With this to guide them, it became a question for the jury to determine whether or not it was the understanding of the parties that the defendant was contracting on his own behalf as principal and not as agent for the Long Beach Association. It is contended that the language attributed to the defendant must be considered in the light of the conceded knowledge which the plaintiff had that the defendant was the manager and agent of the Long Beach Association, and that it should, therefore, be taken as simply the engagement and promise of the principal through him as such agent.

The construction is somewhat strained, and certainly should not be accepted on a motion to dismiss the complaint, especially as the more reasonable view seems to be that the plaintiff, being unwilling to accept the responsibility of the association, sought and obtained the personal engagement and promise of the defendant in terms quite plain and unequivocal. It is unnecessary to enter upon a review of the evidence given on the trial. There was much in the proofs which was appropriate for the consideration of the jury upon the question of the probability of the plaintiff's story and his credibility. We have nothing to do on this appeal with the weight of evidence; it is enough that there was sufficient to call for the submission of the case to the jury.

The trial judge, in the course of his charge, made this state-

ment: "Even if the defendant was the manager and agent of the Long Beach Association, yet if he said to the plaintiff these words: 'You are to look to me for pay' — in other words, 'I will pay the bill; you are doing it for me' — the plaintiff would be entitled to recover at your hands the amount claimed, namely, $500." To this an exception was taken, and it is claimed by the appellant, in effect, that this unduly limited the jury to an exclusive consideration of the words so used, without leaving to them the determination of the import of what was said, in the light of other facts and circumstances in the case, from which they might infer that the defendant was speaking for the Long Beach Association, was contracting for them and not on his own account, and was so understood by the plaintiff. We do not think the exception well taken. In the subsequent portions of the charge the trial judge called the attention of the jury to the other evidence in the case, and charged them that it was their duty to take it into consideration and to determine "what was the original agreement between the parties and what was the intention between the parties in regard to this particular work." The question as to the nature of the agreement and what it really was was thus clearly submitted to the jury upon the whole evidence.

Another exception was taken to the charge in these words: "And I also except to that portion of your honor's charge where you say that the plaintiff understood that he (Murray) was managing the hotel for the year 1896 for himself." A reference to the charge shows that no such statement was made. What the trial judge did say was that the plaintiff said that such was his understanding. This is quite a different thing. The trial judge made the statement in the course of his presentation of the contention of the parties on both sides. He did not in so doing assume to state as a fact anything which it was within the province of the jury to decide, and if the counsel for the defendant feared that it might be misinterpreted by the jury, he should have asked the court to instruct them upon the point. We think, taking the charge as a whole, that the case was fairly presented to the jury, and that it discloses no reversible error.

Numerous exceptions were taken on the part of the appellant to rulings on the trial with respect to the admissibility of evidence. We have examined all of them which have been presented for our consideration on the appellant's points, but fail to find any error raised by competent exception which calls for a reversal of the

judgment. The motion to discharge the jury because of alleged misconduct on the part of the plaintiff or his attorney was properly denied. Apart from the undue importance attached by counsel to what took place, the appropriate remedy was to move to strike out the objectionable matter, and to request the court to charge the jury not to consider it.

The plaintiff offered and the court admitted in evidence a paper received by plaintiff, purporting to be a telegram from the defendant, but the original was not produced and no proof was made that it had been transmitted by the defendant. While the counsel for defendant objected to its admission, the objection was only a general one to its competency. "Such an objection pertains to the subject-matter of the proof offered and not to the method of its presentation, or to any of the preliminary steps to be observed in its introduction." People v. Murphy, 135 N. Y. 450, 454. It is, therefore, too late to claim that a proper foundation had not been laid for the reception of the paper. Furthermore, the telegram was offered immediately after certain letters, conceded to have been written by the defendant, had been received under the objection that they were "irrelevant, incompetent and immaterial," and where it was obvious that the substance of the proof alone was attacked, so that when the objection to the telegram was made in terms, "on the same grounds," the court was entitled to assume that the objection, as thus stated, was made with the same purpose as the preceding one, to which reference was thus made. But apart from this, the defendant's testimony shows that the telegram emanated from him, and whatever error there might have been in originally receiving it in evidence was thus cured.

Judgment affirmed, with costs.

GILDERSLEEVE and GIEGERICH, JJ., concur.

Judgment affirmed, with costs.

WASHINGTON McNAUGHTON, Respondent, *v.* THE METROPOLITAN STREET RAILWAY CO., Appellant.

(Supreme Court, Appellate Term, February, 1898.)

1. Negligence — Charge.

In an action to recover damages for personal injuries caused by the alleged negligence of the defendant the court was requested to charge

that the inflexible rule in such cases was that the jury must be satisfied that the injury was caused solely by the defendant's negligence and also that the plaintiff did not, in any way, by his own negligence or want of care, contribute in any degree to produce the same, and answered "So charged, except the word solely." Held, that as the request was read in the hearing of the jury, the limitation was prejudicial to the defendant, but that it was cured by a subsequent charge that if the jury believed, either that the injury was caused by the plaintiff's own carelessness, or that it was the result of a pure accident, they must render a verdict for the defendant.

2. **Same — Measure of damages.**

Proof that prior to an accident, the person injured had been earning $35 a week; that he could not, at present, do his ordinary work without an assistant and that he could not, without assistance, lift his hand to his head, make a prima facie case for the recovery of damages for loss of occupation.

3. **Same — Physical pain.**

An instruction by the court that, if the plaintiff was entitled to recover, the jury might allow him compensation "for the pain and suffering he underwent and the loss he sustained, and no more," is correct.

APPEAL from a judgment of the General Term of the City Court, affirming a judgment of the Trial Term in favor of the plaintiff, for personal injuries resulting from the negligence of the defendant.

Henry A. Robinson (J. T. Little, Jr., of counsel), for appellant.

Levy & Stuart (M. P. O'Connor, of counsel), for respondent.

GILDERSLEEVE, J. The only exceptions urged upon this appeal by the appellant are (1) to a refusal of the trial judge to charge that there was no evidence from which the jury might find damages for loss of occupation or business, and (2) to the amendment by the trial judge in striking out the word "solely" from the following request to charge, viz.: "In an action of this kind it is an inflexible rule of law that to entitle the plaintiff to recover, the jury, from all the evidence in this case, must be satisfied of two things, first, that the injury sustained by the plaintiff was caused solely by the defendant's negligence, and second, that the plaintiff did not, in any way, by his own negligence or want of care, contribute in any degree to produce the same." This request was

read before the jury, and the court said: "So charged, except the word solely." Previous to this the court had charged that the "plaintiff, before he can recover, must satisfy you by a preponderance of evidence, first, that the defendant was negligent — in other words, that the gripman of the defendant, in the management of that car, on that occasion, was negligent,— and, second, that he himself was free from negligence, and did not contribute to the accident through any fault of his own; because if you find that he did, then he received the injuries through his own fault, and cannot recover for the same from the defendant." The appellant claims, however, that the refusal of the court to use the word "solely" must have left the jury to infer that they were entitled to find for the plaintiff, although the defendant was not solely to blame; and that this was tantamount to charging the jury that they might find for the plaintiff, even if he did contribute to some extent to the injury, since there was no question as to the negligence of any third party.

There seems to be some force in this contention. It will be remembered that this request was read in the hearing of the jury, and after the court had made its charge on the subject in question, as last above quoted. So it is reasonable to suppose that when the court said "so charged, except the word solely," the attention of the jury was brought particularly to this part of the request to charge, and that the preceding instruction of the court on this subject may have become somewhat modified in the minds of the jury. However, immediately afterwards, the court, on the defendant's request, charged that "if the jury believe that the injury to the plaintiff was caused by his own carelessness, or that it was the result of a pure accident, then, in either event, the jury must render a verdict for the defendant." This question, therefore, presents itself, viz.: Does not this instruction, taken with the previous instruction in the body of the charge, on the subject in question, cure whatever prejudice may be said to have been caused by the court's striking out the word "solely" from the request? There was no question of the negligence of any third party presented either by the pleadings or by the evidence, and the court particularly stated, after the refusal aforesaid, that if the plaintiff's carelessness or negligence contributed to the accident, or if the injury was the result of a pure accident, the verdict must be for the defendant. What, therefore, could the jury have understood, except that, to entitle the plaintiff to recover, the defendant's negligence must have been the proximate and only cause of the injury?

We are of the opinion that, although it would have been more correct had the trial judge charged in the exact language requested, it must be said that the alleged error under consideration does not warrant a reversal of the judgment. In the instructions given to the jury upon the question of negligence, both before and after the taking of the exception under consideration, the learned trial judge laid down the law clearly, fully and accurately.

It is a well-settled principle that where the court has charged fully and completely, in its own way, every element of the request, it is not bound to repeat, parrot-like, the words of counsel, or reiterate, in other forms, the clear and pointed instructions already given. Laidlaw v. Sage, 2 App. Div. 378.

The other alleged error, assigned as a ground for reversal, is the refusal of the court to charge that there was no evidence from which the jury may find damages for loss of occupation or business. To this refusal the defendant duly excepted. If, therefore, we find no evidence of a pecuniary loss to the plaintiff, caused by his inability to perform his usual work, the exception was well taken.

The plaintiff testified that it was three weeks before he was able to go upon his wagon, and that he could not do the other work, belonging to his calling, by reason of his injuries; that he could not carry trunks, which it was his business to do, and which he was able to do, without the assistance of another man, before his injuries; that he made efforts to do business, but could not do it, because he was not able to; that he had not been able, and, at the time of the trial, could not raise his arm to his head without the assistance of the other hand; that at the time of the accident he was earning $35 a week.

It must be said that, although this testimony does not indicate any exact sum the plaintiff sustained by way of special damage arising from the loss of occupation, there is some evidence from which the jury might infer substantial damage of that character.

In Orsor v. Metropolitan Cross Town R. R. Co., 78 Hun, 169, cited by appellant in support of his contention, it was held error to permit the jury to consider damage arising from loss of earnings, for the reason that it was evident from the testimony that plaintiff did not know what his earnings were. In the case at bar we have the plaintiff's earnings before the injury, and evidence of the extent of his disability thereafter. We think there was sufficient evidence to sustain a substantial award for pecuniary loss.

We, therefore, see that it was not error for the court to refuse to charge that there was no evidence from which the jury might find damages for loss of occupation or business. In charging the jury on the question of damage, the court said: "Should you find for the plaintiff, under the rules of law I have laid down, you have a right to allow him a fair compensation for the injuries occasioned to him, through the negligence of the defendant's servants, for the pain and suffering he underwent, and the loss he sustained, and no more." This instruction was correct. It fully protected the defendant's rights, and was all upon the subject that the defendant was entitled to have.

There are no other exceptions in the case of sufficient importance to call for discussion.

For the reasons above given the judgment appealed from must be affirmed, with costs.

BEEKMAN, P. J., and GIEGERICH, J., concur.

Judgment affirmed, with costs.

Matter of the Application of MAURICE B. BLUMENTHAL, as Receiver, etc., to Punish SIMON BUTTNER, as for a Contempt of Court.

(Supreme Court, Appellate Term, February, 1898.)

1. **Contempt — Failure to obey order to deliver property to receiver.**

The failure of a judgment debtor to deliver in accordance with an order of the City Court of the city of New York, a certain ring to a receiver of his property, appointed in supplementary proceedings, and his delivery, instead thereof of another ring of little value, constitutes him guilty of a civil contempt (Code of Civil Procedure, § 14, subd. 3, § 3343, subd. 2) punishable by a fine and the costs of the motion.

2. **Same — Form of order of punishment.**

The fact that the defendant has, by its terms, been given an opportunity to comply with the order before a commitment shall issue, does not affect the validity of the order.

3. **Appeals to the Appellate Term — Weight of evidence not considered.**

The Appellate Term cannot, on appeals from the City Court of the city of New York, consider the weight of evidence.

Misc.] Supreme Court, Appellate Term, February, 1898.

APPEAL from an order of the General Term of the City Court of New York, affirming an order of said court granted at Special Term.

Howard A. Sperry, for judgment debtor, appellant.

Maurice B. Blumenthal, receiver in person, respondent.

GILDERSLEEVE, J. The judgment debtor, Simon Buttner, was ordered by the Special Term of the City Court to hand over a certain ring to Maurice B. Blumenthal, as receiver of the property of said Buttner. Said Buttner did hand over a ring to the receiver, but the latter claimed that it was not the ring in question. Accordingly he obtained an order to show cause why Buttner should not be punished for contempt. The motion was duly argued, and affidavits were submitted by both sides. The court decided, from the evidence thus submitted on the motion, that Buttner had not delivered to the receiver the ring which the court had ordered to be delivered to him, but had practiced a deceit on the court by delivering to said receiver another ring, of little or no value, instead of the ring in question. The court also found, as a matter of fact, that by reason thereof the rights and the remedies of said Blumenthal, as such receiver, had been materially injured, prejudiced and impaired. The court, therefore, decreed said Buttner guilty of contempt, and ordered him either to deliver the ring in question to the receiver, within a fixed time, together with $10, costs of the motion, or to pay, within said time, to the receiver $50, found from the evidence to be the value of the ring, together with $10, costs of the motion; and, in case of failure to comply with these requirements, the court ordered the commitment of said Buttner to prison until the said requirements had been fulfilled.

From this order Buttner appealed to the General Term of the City Court, where the order was affirmed, and thence to the Appellate Term of the Supreme Court.

The Appellate Term cannot, upon appeals from the City Court, consider the weight of evidence, but is confined to a consideration of the questions of law. Bogan v. Wright, 22 Misc. Rep. 94. The adjudication of the court, in which the alleged contempt occurred, is conclusive that the party committed the act whereof he was convicted, and of its character, when that might, according to the circumstances, be meritorious or criminal; although it cannot

establish as a contempt that which the law entitled a party to do. People v. Hackley, 24 N. Y. 75.

As the Appellate Term must accept as an established fact that Buttner did not hand over the ring in question to the receiver, but gave him, instead thereof, another ring of little or no value, the only question to be determined is this, viz.: Did this neglect or refusal to obey the order of the court constitute contempt? The court had jurisdiction to make the order requiring Buttner to hand over the ring in question to the receiver; and, on Buttner's refusal to obey the order, contempt proceedings could properly be instituted, as done in the case at bar. McKelsey v. Lewis, 3 Abb. N. C. 64; Code, §§ 2269, 2281 and 2283.

The conduct of Buttner, as found by the court below, clearly constituted a disobedience to the lawful mandate of the court (Code of Civil Procedure, § 3343, subd. 2), and, consequently, Buttner was guilty of contempt, under section 14, subdivision 3 of the Code of Civil Procedure; for his acts as alleged in the affidavits submitted by the receiver on the motion, and as found by the Special Term, materially injured, prejudiced and impaired the rights and remedies of said Blumenthal, as such receiver. See Sandford v. Sandford, 40 Hun, 540; Code of Civil Procedure, § 14.

The fine imposed in the case at bar was within the power of the court. Code of Civil Procedure, §§ 2284, 2285; Moffatt v. Herman, 116 N. Y. 131. This is a contempt punishable civilly, under section 14 of the Code, and not a criminal contempt, under section 8 of the Code; therefore, the case of Stubbs v. Ripley, 39 Hun, 626, holding that costs of motion cannot be imposed in a criminal contempt does not apply. Nor does the case of Bradbury v. Bliss, 48 N. Y. Supp. 912, apply to the case at bar. The defendant has been duly adjudged guilty of the contempt charged in an appropriate proceeding for the purpose, and the penalty has been imposed. The fact that the court has given him an opportunity to comply with the terms of the order, before a commitment shall issue, does not affect the validity of the order, or bring it within the case last above cited, the facts of which are entirely different from those in the present case.

For the reasons above stated, the order appealed from must be affirmed, with $10 costs, and disbursements.

BEEKMAN, P. J., and GIEGERICH, J., concur.

Order affirmed, with $10 costs, and disbursements.

PATRICK McCABE, Respondent, *v.* THE THIRD AVENUE RAILROAD Co., Appellant.

(Supreme Court, Appellate Term, February, 1898.)

Evidence — Opinions of experts.

Where the facts, upon which a medical witness bases his opinion, are not communicated to the jury, he cannot be permitted to testify that, in his opinion, the injuries which a person has sustained will be permanent.

APPEAL by the defendant from a judgment of the General Term of the City Court of New York, affirming a judgment entered upon the verdict of a jury. The opinion states the nature of the action and the material facts.

Hoadly, Lauterbach & Johnson (D. Calman, of counsel), for appellant.

John W. Hutchinson, Jr. (Walter S. Newhouse, of counsel), for respondent.

GIEGERICH, J. This action was brought to recover damages for a personal injury, claimed to have been sustained by the plaintiff in consequence of the negligence of the defendant's gripman, while the former was attempting to drive a piano cart across Third avenue, at its intersection with Tenth street, in the city of New York, on the 16th day of April, 1895.

The only medical expert called by the plaintiff, to prove the nature and extent of his injuries, was Dr. John T. Harrison, who testified that he examined the latter on the 19th day of April, 1895, and that, from the history of the case as given by the plaintiff, he was of the opinion that he had sustained a concussion of the spine. The witness described the condition in which he found the plaintiff on said occasion, and further testified, that he advised him to go to his family physician or consult someone else. He was then asked this question: "Can you state, from your examination of that man, taking the history of the case, whether or not you can state with reasonable certainty whether the injuries will be permanent or not?"

This was objected to "as incompetent, as not stating what the

opinion was based upon, as immaterial and irrelevant, and as not sufficiently definite and certain." The objection was overruled, the defendant's counsel noting an exception to the ruling, and the witness was permitted to answer "Yes."

He was also asked this question: "Now, speaking with reasonable certainty, will they be permanent, in your opinion?"

This was likewise objected to by defendant's counsel, upon the same grounds; the objection was overruled, counsel again noting an exception, and the witness was permitted to answer "They will."

These rulings were clearly improper within the authorities, which require the witness to communicate to the jury the facts upon which his opinion is desired. Reynolds v. Robinson, 64 N. Y. 589; Guiterman v. Liverpool Steamship Co., 83 id. 358; People v. McElvaine, 121 id. 250-258; Link v. Sheldon, 136 id. 9; Matter of Will of Snelling, id. 515, 518; Frankfort v. Manhattan R. R. Co., 12 Misc. Rep. 13, 14, and citations. The court, in the last cited case, speaking through Judge Pryor, page 14, said: "A physician cannot be permitted * * * to take into consideration facts known to him, but not communicated to the jury. The party against whom the evidence is offered is entitled, if he so desires, to have an explicit statement made to or by the expert witness of the precise state of facts upon which his opinion is based." Although the witness testified that he had never seen or known the plaintiff prior to the said examination, and that his opinion as to the permanent character of the injuries was based solely upon the history of the case as given by the plaintiff, not a particle of testimony was offered touching such history. Even if it had been, the question would have been improper, for: "The principle is not changed by the circumstance that all the testimony embraced within the sweeping terms of the question was before the court, or by the fact that the mass of testimony upon which the opinion was based came from witnesses of the opposite party. The necessity of a specific question, at the time of the examination of the witnesses, covering all the facts, or assumed facts, upon which the opinion of the expert is required, is as apparent in such a case as in any other." Matter of Will of Snelling, 136 N. Y. 518, 519, per O'Brien, J.

It follows from these views that the admission of the evidence in question was error, which, to my mind, was so radical as of itself to necessitate a reversal of the judgment, and, therefore, it is not essential that we specifically consider all the points urged by the appellant upon this appeal.

The judgment should, therefore, be reversed and a new trial ordered, with costs to the appellant to abide the event.

BEEKMAN, P. J., and GILDERSLEEVE, J., concur.

Judgment reversed and new trial ordered, with costs to appellant to abide event.

KATHRYN M. BOSTWICK, Respondent, *v.* JOHN L. BROWER, Appellant.

(Supreme Court, Appellate Term, February, 1898.)

1. Husband and wife — Abandonment — Husband's subsequent liability for necessaries.

Utter indifference and neglect upon the part of a husband, not accompanied by proof of physical violence, threats or specific misconduct of any kind towards his wife, do not justify her in abandoning him, nor render him liable to third persons who thereafter supply her with necessaries.

2. Same — Agency of wife.

No presumption of a continuing agency upon the part of a wife, to procure necessaries on her husband's credit, can assist a claim for such necessaries, furnished after his abandonment and without knowledge of the same, where the vendor had never rendered to the husband any bills for necessaries purchased by the wife nor received payment for any such bills from him personally.

APPEAL from judgment of the Eighth Judicial District Court.

William M. Mullen, for appellant.

Julius Lehmann, for respondent.

BEEKMAN, P. J. The law is well settled that a wife is entitled to procure what is reasonably necessary for her support and maintenance on her husband's credit where he fails to make proper provision for her necessities, and this power continues although they may be living in a state of separation, provided such separation has not been caused by the wrongful act of the wife. This obligation thus resting upon him springs out of the marital relation, and is one of the duties which the law declares must be assumed by the

husband, and from which he can in no way escape, where the necessities of the wife call for its performance and she has not forfeited her right by her misconduct. Although the wife is sometimes described as his agent for the purpose, such a characterization is apt to be misleading, as the power is, not only in nowise dependent upon the authority of the husband, but in a proper case may be exercised against his consent, and in spite of his protest. Hence it has been called "an agency of necessity" (Schouler's Domestic Relations [5th ed.], § 70), and the husband is said to be estopped from disputing it by reason of his misconduct in failing to perform his legal obligation. Where, then, a wife abandons her husband for good cause, and her condition is such that a recourse to her husband's credit becomes necessary for her support, those who furnish her with necessary supplies on his account can compel him to pay therefor. In seeking a recovery against him, however, they assume the burden of establishing the fact that the conditions existed which would justify the wife in so purchasing on the credit of her husband. Schouler's Domestic Relations (5th ed.), § 69; Bloomingdale v. Brinckerhoff, 2 Misc. Rep. 49; McCutchen v. McGahay, 11 Johns. 280; McGahay v. Williams, 12 id. 292; People v. Pettit, 74 N. Y. 320. In the case last cited, the court says: "The plaintiffs were bound at least to establish such a case as would entitle a third person to recover against the husband for necessaries furnished the wife. The rule in such cases is, that during cohabitation the assent of the husband is presumed, but if they are living apart the burden is upon the person furnishing the necessaries to show that the circumstances are such as to render the husband liable."

In the case at bar, the plaintiff furnished the defendant's wife with certain articles of attire some three months after she had abandoned him. The evidence with respect to the grounds for the abandonment is of the most general character. She says that she left the defendant, to use her own words, "on account of his utter indifference and neglect which I could not stand any longer. While my father or grandfather lived I was his pet. At his death it was more than I could stand to have to live with Mr. Brower who never paid any attention to me, and I simply left him on my own accord because I could not stand it any longer. I left of my own accord." There was no claim of any physical violence, threats or specific misconduct of any kind. It is quite plain that this was not sufficient to justify this wife in her abandonment. As is said by Professor Schouler: "The wife should have weighty and sufficient cause for

leaving her husband in order to be permitted on her part to pledge his credit abroad. In general the same facts suffice as justify her divorce from bed and board." Schouler on Domestic Relations (5th ed.), § 66, p. 109; Blowers v. Sturtevant, 4 Den. 46. We are of the opinion that the plaintiff has failed to make out a cause of action against the defendant founded upon the claim of a justifiable abandonment.

It is contended, however, that the plaintiff may still recover on the ground of an agency in fact, apparently vested in the wife by the previous conduct of the defendant, upon which the plaintiff was entitled to rely, in the absence of knowledge of the separation. It is, of course, true that where the husband has constituted the wife his agent in the purchase of supplies, be the form of such sanction what it may, the familiar rules of agency apply, and his liability then rests upon the determination of a mere question of fact, and is based upon grounds quite different from those which we have just considered. 9 Am. & Eng. Enc. of Law, 832. Where his previous conduct has been such as to support the inference that his wife was entitled to purchase on his credit, he is deemed to have vested her with an appearance of authority in that regard, upon which an innocent third party, acting in good faith and without knowledge of the separation of the parties, may rely in subsequently furnishing the wife with supplies.

The facts before us, however, do not seem to bring this case within the rule laid down. While it appears that the defendant's wife had dealt with the plaintiff before she abandoned her husband, it does not appear that the defendant knew the fact, or that any bill for any articles so purchased had ever been rendered to him, or that he ever personally paid the plaintiff any money on account of any such indebtedness. On the contrary, the proof shows that whatever the wife obtained she paid for herself in bills, and the record is barren of any evidence showing any act on the part of the defendant on which an agency in fact can be predicated. That the defendant supplied his wife with money with which to provide for herself does appear, but nothing more. The case of Hartjen v. Ruebsamen, 19 Misc. Rep. 149, is referred to by the counsel for the plaintiff. But in that case the court held that the defendant was liable because, after the separation, he personally paid to the plaintiff a bill, which had been previously incurred by the wife, without advising the plaintiff that she no longer had any authority to incur any further liability on his account. It was held that an

actual agency in the wife was to be inferred from the subsequent assent of the husband in paying the previous debt without objection or qualification; and that the plaintiff, having no knowledge or information of the change which had taken place in the relations of the parties, was entitled to assume the continuance of the authority with which the wife had been apparently vested by the husband. The case is quite different in its facts from the one now before us, and in no way conflicts with the conclusion to which we have come, that there was no actual authority or appearance of authority vested in the defendant's wife through any act of his or for which he was responsible to pledge his credit for the articles purchased by her from the plaintiff.

The judgment of the court below must, therefore, be reversed, and a new trial ordered, with costs to the appellant to abide the event.

GILDERSLEEVE and GIEGERICH, JJ., concur.

Judgment reversed and new trial ordered, with costs to appellant to abide event.

CHRISTIAN F. MEYER, Appellant, *v.* JULIUS BRENZINGER et al., Respondents.

(Supreme Court, Appellate Term, February, 1898.)

Contract — Exclusive license to use a patent — Construction.

An agreement by the terms of which licensees, in consideration of the exclusive use for one year of a patent, expressly promise the patentees to sell not less than a certain number of buttons within the year and also pay a royalty on each button sold and which subsequently provides that, if the licensees do not sell the prescribed number, they shall lose their option of renewing the contract or of buying the patent itself at the end of the year, entitles the patentees to the absolute payment of royalties on the minimum number fixed, irrespective of the number sold; and the contention that the only effect of failing to sell the minimum number was to forfeit the option, renew the contract or buy the patent, is not tenable.

APPEAL from judgment of the Eleventh Judicial District Court.

Charles A. Brodek, for appellant.

Robert Goeller, for respondents.

BEEKMAN, P. J. The two papers, respectively signed by the plaintiff and his assignor, on the one part, and by the defendants on the other, are to be considered together as embodying the contract which was entered into between them. They were simultaneously executed and delivered and relate to the single transaction with which the parties were dealing. By the terms of the agreement, the plaintiff and his assignor, who were doing business under the name of the La Lune Novelty Company, agreed to pay to the defendants, who were the inventors and patentees of an article described as a "coin button holder," one-quarter of a cent royalty on each button sold by said company within one year from the date of the agreement; the company further agreed to sell not less than 250,000 buttons within that period. The defendants bound themselves to transfer to the company the exclusive control of the patent and the exclusive right to manufacture buttons under the same for the same time, and also gave to said company an option on the expiration of the contract either to renew the same or to buy the patent outright. It was, however, stipulated by the company, that "if the La Lune Novelty Co. should not come up to the agreed sale of 250,000, said company will lose their option of renewing this contract or buying the patent at the end of the year of this contract." The royalty was to be paid at the end of each month, and one of the defendants was to have the right to inspect the books of the company at any time with respect to the extent of the sales made. Simultaneously with the delivery of the contract, the company paid to the defendants the sum of $200, and received a receipt therefor, stating that the payment was made "on account of royalty for coin buttons."

It appears that during the year specified the company failed to sell more than 12,000 buttons, the royalty upon which, at the rate agreed upon, amounted to $30. The plaintiff, to whom his copartner has assigned his interest in the claim, now sues to recover the sum of $170, being the difference between the amount of the sum so paid on the delivery of the contract and the royalty on the actual sales made. The theory of his action is that, under a proper construction of the contract, his company was bound to pay royalties only on sales actually made; that the only effect of the failure to comply with the agreement to sell 250,000 buttons was the forfeiture of the option to renew the contract or buy the patent, and that the defendants are liable for the amount sued for on equitable grounds for which an action for money had and received will lie.

We do not think there is any basis for this claim. The agreement on the part of the company to sell 250,000 buttons within the year is as plain as language can make it, and their failure to keep it entitled the defendants to receive a sum equivalent to a royalty, at the rate specified, on a sale of 250,000 buttons. This construction is both obvious and reasonable. The defendants had surrendered to the company for the period of a year the exclusive possession and use of the patent, and during that time they were precluded from deriving any advantage from it, except through the performance of the agreement under consideration. It was, doubtless, the expectation of the company that they would be able to sell at least 250,000 buttons within the prescribed period, and it was quite reasonable that the defendants, in consideration of the exclusive rights which they had conferred, should require that, so far as they were concerned, such expectation should be reduced to a certainty. In short, the agreement was that the defendants should receive for what they gave at least the sum of $625, and as much more as might result from sales actually made by the company in excess of 250,000 buttons.

The counsel for appellant points to certain provisions of the contract which he claims negative this construction. His contention would be quite potent if the contract provided that the company should sell 250,000 buttons, but no more. It loses all force, however, in view of the fact that the number thus mentioned is a minimum and not a maximum limit. The agreement was made with a view to the widest attainable field of trade, and the provisions referred to are appropriate to this manifest purpose. It is urged that the provision for a forfeiture of the option conferred upon the company to renew the contract or purchase the patent, in case the sales did not reach the minimum limit, is without reasonable support, if it be held that the defendants are entitled to receive the same benefit under the contract that they would if the sales had actually attained such limit. But the counsel for the appellant apparently loses sight of the fact that the defendants were naturally interested in extending the trade in the buttons as widely as possible, and it was both reasonable and prudent that they should reserve to themselves, as they did, full liberty of action to resume the business, at the end of the year, for the purpose of widening the market for their product through their own efforts or through some other agency more capable and enterprising than the La Lune Novelty Company.

It may further be said that the unqualified payment by the plaintiff and his assignor of the sum of $200 simultaneously with the execution of the contract is more consistent with the construction which we have given to that instrument than that for which the appellant contends.

The conclusion to which we have come renders it unnecessary for us to consider the other questions raised on the appeal. As we are of the opinion that the court below was clearly right in dismissing the complaint on the grounds which we have discussed, the judgment must be affirmed, with costs.

GILDERSLEEVE and GIEGERICH, JJ., concur.

Judgment affirmed, with costs.

DANIEL J. RANDALL, Appellant, *v.* THE MORNING JOURNAL ASSOCIATION, Respondent.

(Supreme Court, Appellate Term, February, 1898.)

District Courts of New York city — Fees of experts are not taxable.

The fees of witnesses, upon a trial had in a District Court of New York city, are fixed exclusively by the Consolidation Act (Laws of 1882, chap. 410, § 1370) and, as the statute allows nothing for the services of experts, they cannot be taxed as disbursements.

APPEAL from orders taxing as part of the costs and disbursements of the defendant $10 expert witness fees, and also from so much of the judgment as contains this item of $10 expert witness fees.

Herbert J. Hindes, for appellant.

Einstein & Townsend, for respondent.

BEEKMAN, P. J. The question brought up for review concerns the power of the court below, in adjusting the costs and disbursements of the action, to tax and allow to the respondent the sum of $10 paid by it for the services of an expert witness who testified for it on the trial. There is no authority for such an allowance. The fees of witnesses attending the trial in a District Court are fixed by section 1370 of the New York City Consolidation Act, and

only such as the statute sanctions can be allowed. Although it may be necessary, in order to secure expert evidence, to pay the witness compensation for the service which is required of him, outside of the allowance prescribed by law for his attendance, it is well settled that the sum so paid cannot be included in the taxable disbursements of the action. Matter of Bender, 86 Hun, 570. Judgment modified by deducting therefrom the sum of $10, and as so modified, affirmed, without costs.

GILDERSLEEVE and GIEGERICH, JJ., concur.

Judgment modified, and as modified, affirmed, without costs.

THE NATIONAL CASH REGISTER CO., Respondent, *v.* LEON C. RIGGS, Appellant.

(Supreme Court, Appellate Term, February, 1898.)

1. **Action on a written contract — General denial — Parol evidence that the contract was not made.**

   Where the complaint, in an action upon a contract of conditional sale, alleges that the defendant executed a written contract annexed to the complaint, partly written and partly printed, and containing a provision for the payment of a part of the purchase price in notes, and the answer besides denying these allegations, alleges that it was agreed that no notes should be given and also states that the defendant signed in blank, a printed paper similar to the contract set forth, in reliance upon the understanding that no notes were to be given, the defendant may show by parol that the provision as to the notes was not in the contract when he signed it; and the admission of such evidence does not violate the rule excluding parol evidence which tends to contradict or vary the terms of a written instrument.

2. **District courts of New York city — Amendment of pleadings.**

   A justice of a District Court of the city of New York has power, at any time before or during a trial, to amend the pleadings, if substantial justice will be promoted thereby.

APPEAL from a judgment of the Sixth Judicial District Court in favor of plaintiff.

Clifford H. Gest (J. Park Henderson, of counsel), for appellant.

Perkins & Butler, for respondent.

GILDERSLEEVE, J. This is an appeal from a judgment of the Sixth Judicial District Court in favor of the plaintiff. The action is on a contract of conditional sale of a National cash register by the plaintiff to the defendant. The complaint, in paragraph II, alleges that "on or about the 19th day of April, 1897, plaintiff and defendant entered into a contract in writing, a copy of which, marked 'A,' is hereto annexed and made a part of this complaint." The said exhibit "A" contains a provision that part of the price for the cash register should be paid by notes of $10 each, payable monthly. The answer, in paragraph II, "denies each and every allegation contained in the second paragraph of the complaint," and, in paragraph VII, the answer alleges "that it was expressly agreed, at the time that the above contract was entered into, that no notes were to be given by the defendant, and the defendant, acting upon said agreement, signed in blank a printed paper in substance similar to plaintiff's exhibit 'A,' on the understanding, in furtherance of the agreement and representations made by the plaintiff's agent, that no notes were to be executed by defendant."

Upon the trial the plaintiff put in evidence the contract, which was partly printed and partly written in pencil, and parts of the printed matter were erased in pencil. It contained the provision as to the notes, as set forth in the copy attached to the complaint, marked "A," as above stated. Plaintiff's agent testified that the contract was signed in his presence by the defendant, and in answer to the question "Was that all filled out as it is?" replied "Yes, sir." On cross-examination, he was asked, "Is it not a fact that when Mr. Riggs signed that contract, all reference to any notes was stricken out?" This was objected to, and the court adjourned the trial, for about two weeks, to give defendant's counsel an opportunity to submit a brief on the admissibility of this evidence. On the return day plaintiff rested, and defendant asked leave to amend the answer by setting up an allegation to the effect that, after the contract had been signed, plaintiff had fraudulently altered and modified the same by inserting the provision with regard to notes, above referred to. The motion was denied on the ground that defendant was guilty of *laches* in waiting until the close of the plaintiff's case before making his motion. The defendant, thereupon, went on with his defense, and was asked the following questions by his counsel, viz.: "I will ask you whether you signed that instrument, as it appears there?" Also, "Calling your attention again to that contract, you will notice about a little

over half way down that there is a statement in the contract, $25 upon delivery, and notes for $10, payable monthly. I ask you if that was in the contract signed by you or not?" These questions were ruled out by the trial judge. It is our opinion that this ruling was erroneous. Under the pleadings, as then before the court, the defendant was at liberty to show that the contract, put in evidence by the plaintiff, was not the contract he had executed. Boomer v. Koon, 6 Hun, 646. Under the denial of the allegation of the complaint, setting forth the contract, the defendant had a right to prove anything that would show the allegation untrue. Boomer v. Koon, 6 Hun, 646; also Wheeler v. Billings, 38 N. Y. 264-265. Under this denial and the allegations in paragraph VII of the answer, above set forth, it was competent for the defendant to show that said provision as to notes was not in the contract when he signed it. See Boomer v. Koon, 6 Hun, 645; Schwarz v. Oppold, 74 N. Y. 307. We do not see that the doctrine, here laid down, is in any way in conflict with the well- established rule that "Fraud is never presumed; and in order to entitle a party to relief, on that ground, it is essential that fraud be distinctly alleged in the pleadings, so that it may be put in issue, and evidence thereof given." 9 Ency. of Plead. & Prac. 684. The plaintiff puts in evidence a certain contract, a copy of which was set forth in the complaint, and its agent testifies that it was in its present form when defendant signed it, thus in a measure himself opening the door to the introduction of the excluded testimony. The defendant wishes to testify that one of the provisions was not in it when he signed it. His answer denies the contract as set forth in the complaint, and alleges a distinct agreement that there were to be no notes given, and that the defendant, acting on such understanding and the representations of the plaintiff's agent, signed a contract in blank. It seems to us that the excluded questions were proper. The plaintiff's contention that the attempt, on the part of the defendant, to introduce this line of testimony was in violation of the rule that "parol, contemporaneous evidence is inadmissible to contradict or vary the terms of a valid written instrument," is untenable. The defendant was simply seeking to show that the contract, put in evidence, was not the contract he had executed, inasmuch as the contract signed by him contained no reference to any notes. Boomer v. Koon, *supra*.

In Schwarz v. Oppold, *supra*, the complaint set forth a note payable on demand with interest. The answer of the maker contained

a general denial. The note put in evidence purported to be payable with interest, as alleged in the complaint. The Court of Appeals held that " It was clearly competent for the defendant under his general denial, to controvert this proof by showing that the note had been altered since its execution by adding the words, 'with interest.' "

In Boomer v. Koon, 6 Hun, 645, the complaint alleged in the usual form the making and delivery of the note sued upon, and described the note according to its terms; the answer denied the making and delivery of the note, as alleged in the complaint. At the trial, the plaintiff produced the note described in the complaint, and proved the defendant's signature thereto. The defendant then offered to prove that said note had, after its execution and delivery, been altered by adding the words " with interest." The objection to the introduction of such testimony was sustained, and the General Term held this ruling to be error. The court said, " The proof that the note, produced on the trial, had been altered in a material part, was clearly proof that it was not his note; that he did not make and deliver such note." And the court held that defendant should not have been precluded from such defense because he had omitted to set it up in his answer.

Having reached the conclusion that the judgment should be reversed for the error above set forth, it becomes unnecessary to discuss the propriety of the denial of the motion to amend the answer. We may say, however, that a justice of the District Court has ample power, at any time before trial or during the trial, to amend the pleadings, if substantial justice will be promoted thereby; and it is not wholly within the discretion of the justice to refuse the proposed amendment, but suitors have a right to insist upon the exercise of this power in a proper case. See Vaughn v. Lego, 17 N. Y. St. Repr. 279; Code, § 2944, made applicable to District Courts by section 1347 of Consolidation Act.

For the reason above stated the judgment appealed from must be reversed, and a new trial ordered, with costs to the appellant to abide the event.

BEEKMAN, P. J., and GIEGERICH, J., concur.

Judgment reversed and new trial ordered, with costs to appellant to abide event.

BURTON E. GREENE, Appellant, *v.* CHARLES D. SHAIN, Respondent.

(Supreme Court, Appellate Term, February, 1898.)

Foreign corporations — Failure to keep a stock book — Refusal to show it.

Where a foreign corporation, having an office but no transfer agent in this State, has failed to comply with the provisions of the Stock Corporation Law (Laws of 1890, chap. 564, § 53, as amended by Laws of 1897, chap. 384), requiring it to keep in its office a stock book for the inspection of stockholders, a person, in the office but not shown by a preponderance of proof to have been an officer of the corporation, cannot be made liable, for the statutory penalty imposed upon a refusal to show the stock book, by proof that he answered a demand for it by saying to the stockholder that the book was not in the office, that it could not be shown and that the only book of that character was in the foreign state.

APPEAL from a judgment of the Seventh Judicial District Court.

D. J. M. O'Callaghan, for appellant.

Alexander Tison, for respondent.

GILDERSLEEVE, J. The action is brought to recover a penalty of $250, under chapter 384 of the Laws of 1897, amending section 53 of the Stock Corporation Law. The statute provides as follows, viz.: "Every foreign stock corporation, having an office for the transaction of business in this state, except moneyed and railroad corporations, shall keep therein a book to be known as a stock-book * * * Such stock-book shall be open daily, during business hours, for the inspection of its stockholders. * * * If any such corporation has in this state a transfer agent, * * * such stock-book may be deposited in the office of such agent, and shall be open to inspection at all times, during the usual hours of transacting business, to any stockholder. * * * For any *refusal* to allow such book to be inspected, such corporation and the *officer or agent* so refusing shall each forfeit the sum of $250, to be recovered by the person to whom such refusal was made."

The plaintiff was a stockholder of the corporation known as the "Electricity Newspaper Co.," a foreign corporation and not a

moneyed nor railroad one. It is undisputed that this corporation had no transfer agent in New York. On August 2, 1897, somewhat more than two months after the statute in question had gone into effect, plaintiff and his attorney, Mr. O'Callaghan, went to the office of the corporation in this city, where they found the defendant, who was also a stockholder, sitting at an open desk in the business office. Plaintiff made a demand upon the defendant for an inspection of the stock-book. The defendant replied that the only stock-book was in New Jersey. Whereupon, Mr. O'Callaghan said to the defendant, "Do I understand you to *refuse* to show Mr. Greene the stock-book?" The defendant replied, "No, I do not *refuse;* it is not here. I *cannot* show it to him." The plaintiff, thereupon, brought this action for the penalty provided for in the statute above referred to, claiming that the defendant was an *officer* of the corporation, and had *refused* to allow plaintiff to inspect the stock-book. The defendant denies both of these allegations.

The testimony shows that the corporation did not have a stock-book there at the time of this demand; but immediately afterward, having had their attention called to the statute, enacted some two months before, of which they had been in ignorance, they prepared such a book and had it placed in their New York office, where plaintiff was at liberty to inspect it, had he so desired.

The statute, under which this action is brought, being penal in its character, must be strictly construed. Its scope must not be enlarged by implication or inference, and the penalty must not be imposed, except in a case where the plain language of the provision requires it. See Whitaker v. Masterson, 106 N. Y. 277. A strict construction of the wording of this statute does not authorize any assumption that defendant is punishable for the neglect of the corporation to have the stock-book on hand on the occasion in question. The only issue raised by plaintiff's claim in the case is this, viz.: "Was the defendant an officer of the corporation, and did he refuse to allow the plaintiff to examine the stock-book?" Inasmuch as there was no stock-book there, it was clearly beyond the defendant's power to comply with plaintiff's demand; and he particularly stated that he did *not refuse*, but that he *could not* show the book to plaintiff for the reason above stated. See Kelsey v. Process Co., 41 Hun, 20.

The evidence as to whether the defendant was an officer of the corporation is conflicting and not very satisfactory. The defendant and one of his witnesses deny positively that he was an officer,

but admit the performance of acts and duties on his part that rather tends to show the contrary. We think, however, that there was sufficient evidence to sustain the justice in finding that the defendant was not such an officer, within the intendment of the law, as to be subjected to the penalty in question. Where the justice has made his decision on controverted questions of fact, the weight of evidence will not be reviewed, except in cases of clear injustice. See Patterson Co. v. Lichtenstein Co., 9 Misc. Rep. 126.

We are of the opinion that the judgment appealed from should be affirmed, with costs.

BEEKMAN, P. J., and GIEGERICH, J., concur.

Judgment affirmed, with costs.

ROBERT OPPENHEIM, Respondent, *v.* THE WEST SIDE BANK, Appellant.

(Supreme Court, Appellate Term, February, 1898.)

1. **Bills and notes — Money paid on a raised check.**

Proof that the innocent indorser of a raised check deposited it with his bank, that the latter through its agent collected the proceeds of the drawee in a foreign state, that thereafter the teller of the bank, after inquiry made of its discount and collection clerk, stated to the indorser that the check was "all right" and that, after the indorser had checked out most of the proceeds of the check, the forgery was discovered by the drawee, was reported to the bank and the indorser promptly notified thereof, entitles the bank to recover of the indorser the money paid.

2. **Same — Warranties of indorser.**

An indorser of a check warrants, as to the drawee, the genuineness of the instrument and that of all preceding indorsements.

3. **Same — Warranty of drawee.**

The drawee of a check is held to a knowledge of the genuineness of the signature of the drawer but not as to the genuineness of the body of the instrument.

4. Same — Authority of a bank teller.

The statement of a bank teller that a check, deposited for collection and which had been paid by the drawee, was "all right," must be limited to the mere fact of payment and does not estop the bank from subsequently alleging, as against the depositor, that the check had been altered.

APPEAL by the defendant from a judgment of the District Court in the city of New York for the eighth judicial district, rendered upon a trial before the justice thereof without a jury.

The nature of the action and the material facts are stated in the opinion.

Deyo, Duer & Bauerdorf (Robert C. Beatty, of counsel), for appellant.

Myer J. Stein, for respondent.

GIEGERICH, J. On the 4th day of June, 1897, R. M. Braithwait & Co., of Philadelphia in the state of Pennsylvania, issued their check upon the Northwestern National Bank of the same place for the sum of $8.50, payable to the order of one F. R. Lee. The body of the check was subsequently altered by adding the letter "y" to the word "eight" and a cipher after the numerical figure "8," thus raising the amount to $80.50, and, as altered, it was delivered by the payee, Lee, to the plaintiff, to whom the former was indebted in the sum of $5, plaintiff agreeing to return to him the balance. The check so altered and bearing the indorsements of both Lee and the plaintiff was on June 15, 1897, together with $20 in bills and aggregating $100.50, deposited by the latter with the defendant, for which amount he received credit in his pass-book and at which time he informed the bank's receiving teller that "he didn't want the check placed to his credit unless they were positive it was all right." The defendant then sent the check to its Philadelphia correspondent, the Philadelphia National Bank, for collection, and the latter, after collecting the amount of the check as raised, informed the defendant bank that it had been placed to its credit.

On the 19th day of June, 1897, the plaintiff, having been informed by defendant's discount and collection clerk that the check was "all right," withdrew the sum of $75 and paid it over to the person claiming it. Defendant's correspondent on the 17th day of

July, 1897, returned the check with notice that it had been raised, and that defendant's account had been charged with the amount thereof, the Philadelphia National Bank having on the day previous received notice from the drawee of the spurious character of the check. Thereupon the cashier of the defendant personally informed the plaintiff of the forgery, and three days later sent him a formal letter to the same effect. The defendant having refused to pay plaintiff the amount on deposit, viz., $46.15, the latter brought this action to recover it.

The pleadings were oral. The answer, besides being a general denial, set up a counterclaim for $34.35, claiming that the plaintiff had overdrawn his account to that extent after charging it with the amount of the raised check. However, the defendant now concedes that this is incorrect and that the counterclaim should be reduced to $25.85 after charging plaintiff's account with $72, being the difference between the original and the raised check.

Judgment was given the plaintiff for the full amount claimed, from which the defendant has appealed.

The substantial question presented by this appeal is, whether the defendant was entitled to charge the plaintiff's account with the amount of the raised check. This involves a consideration of certain general principles applicable to commercial paper and regulating the rights and obligations of the respective parties, which, so far as they relate to the facts of this case, are as follows:

(1) The plaintiff, as an indorser and holder of the check and claiming to be entitled to receive the amount thereof from the drawee, warranted the genuineness of the instrument and of every preceding indorsement. Canal Bank v. Bank of Albany, 1 Hill, 287; Bank of Commerce v. Union Bank, 3 N. Y. 230, 237; Turnbull v. Bowyer, 40 id. 456; White v. Continental Nat. Bank, 64 id. 316, 320; Corn Exchange Bank v. Nassau Bank, 91 id. 74; Third Nat. Bank v. Merchants' Nat. Bank, 76 Hun, 475.

(2) The Northwestern National Bank in Philadelphia, as drawee of the check, can only be held to a knowledge of the signature of R. M. Braithwait & Co., its depositors, who were the drawers. By accepting and paying the check, it only vouched for the genuineness of the signature, and cannot be held to a knowledge of the want of genuineness of any other part thereof or of the *bona fides* of the holder. National Bank of Commerce in New York v. National Mechanics' Banking Association of New York, 55 N. Y. 211; White v. Continental Nat. Bank, *supra*.

(3) The forwarding of the check by the defendant to its correspondent in the usual course of business, in the absence of any express agreement in reference thereto, did not vest the title in the latter. Dickerson v. Wason, 47 N. Y. 439; National Park Bank v. Seaboard Bank, 114 id. 28, 34.

(4) Money paid upon a raised check may be recovered, provided the one seeking to recover has not by his careless or negligent act injured or prejudiced the rights of the person from whom the recovery is sought. National Bank of Commerce in New York v. National Mechanics' Banking Association, *supra;* Maine National Bank v. National City Bank, 59 N. Y. 67, 77; Clews v. Bank of New York National Banking Ass'n, 89 id. 419; Third National Bank v. Merchants' Bank, *supra;* National Park Bank v. Eldred Bank, 90 Hun, 285.

The obligation of the defendant to return to the drawee the money received on the raised check, through its correspondent, is amply supported by the cases last cited. It was, therefore, entitled to charge the plaintiff with the amount so received, unless it had been guilty of negligence, and the burden of establishing that was, under the circumstances, upon the plaintiff. Mayer v. Mayor, 63 N. Y. 455, 457; Indig v. National City Bank of Brooklyn, 80 id. 100, 105. This he claims to have done, and he has called our attention to certain testimony which he regards as conclusive upon that point.

It is insisted by the plaintiff that the statement of the teller of the defendant that the check was "all right," made in response to an inquiry by him of the latter, and the payment by plaintiff, in reliance thereon, of the sum of $75 balance due to the person from whom he received the check, constitute an estoppel *in pais*. The inquiry referred to was addressed to the discount and collection clerk of the defendant, "who looked at some book and said it was all right" after plaintiff had informed him that the person present was "the man he had to give $75 change to." As neither of the parties knew of the alteration when such conversation was held, and as the attention of the defendant's officers or employees was not called to the filling in of the check, or circumstances of suspicion disclosed to either of them if plaintiff had such, it seems to my mind a reasonable inference to draw from the evidence that inquiry, regarding any change in the body of the check, was not then within their contemplation. The duties of the teller in question related solely to the discount and collection of commercial

paper, and his response that the check was "all right" must be limited to the fact of its payment by the drawee and not extended to the genuineness of the body of the check, and, therefore, the defendant is not, under the circumstances, estopped from alleging any alteration therein.

These views find ample support, by analogy at least, in numerous cases, among which are: Espy v. Bank of Cincinnati, 18 Wall. 604; Marine National Bank v. National City Bank, *supra;* Security Bank v. National Bank of the Republic, 67 N. Y. 458; Clews v. Bank of New York National Banking Ass'n, *supra.* In Espy v. Bank of Cincinnati, above cited, a check had been raised from $26.50 to $39.20, and the name of the payee changed from Mrs. E. Hart to Espy, Heidelbach & Co., and it was then offered to the latter by a stranger in payment for bonds and gold purchased. The said firm sent to the bank for information regarding the check, and upon the teller's replying, "It is good" or "It is all right," they received the check, delivered the bonds and gold to the purchaser, and passed the check through the clearing house. The bank paid the check, but, on discovering the forgery, brought an action, in which it prevailed, to recover back the money from said Espy, Heidelbach & Co. The court held the following, among other propositions: "First. That where money is paid by mistake on a raised check, neither party being in fault, it may be recovered back as paid without consideration. Second. That where a party to whom such check is offered sends it to the bank on which it is drawn, for information, the law presumes that the bank has knowledge of the drawer's signature, and of the state of his account, and it is responsible for what may be replied on these points. Third. That, unless there is something in the terms in which information is asked that points the attention of the bank officer beyond these two matters, his response that the check is good will be limited to them, and will not extend to the genuineness of the filling in of the check as to payee or amount."

The doctrine of this case is applied in the cases of Marine National Bank v. National City Bank and Clews v. Bank of New York National Banking Ass'n, *supra.* In the latter case a check, after certification, was raised and the name of the payee changed, and was then offered to the plaintiff, who sent to the teller of the certifying bank and asked if the certification was good. The teller, although the bank had previously been requested to stop payment

of the check, answered "yes," whereupon plaintiff accepted it in payment for certain bonds. In an action against the certifying bank to recover the amount of the raised check it was held that the plaintiff had no remedy against the defendant; and regarding the inquiry made of the teller of the bank concerning the check, the court, speaking through Allen, J., said, in part: "If the holder desires more accurate information his inquiry should be more specific and far-reaching before he can transfer a loss, caused to him by the fraud of the person with whom he deals, to the innocent acceptor."

In Security Bank v. National Bank, *supra*, the check was altered as to the amount and the name of the payee, and in that condition offered to Duff & Tienken, who were gold brokers, in payment for gold. One of the firm went with the check to plaintiff's bank, told the teller that he did not like the looks of the messenger who brought the check to his firm and who was a total stranger, and that he "wanted the teller to be very particular before certifying the check, as he had a doubt in his mind about it and wanted to be assured that the check was genuine in every particular." The teller examined the check, certified it and handed it back, saying, "You need not have the slightest doubt about that check, it is correct in every particular; the drawer is a director of the bank," and the check was thereupon received by Duff & Tienken. The plaintiff, having paid to the defendant the amount of the raised check, brought an action to recover the amount thereof, and it was held that the plaintiff was not estopped by the statement made by the teller when the check was presented for certification. The court, through Andrews, J., said: "It was no part of the teller's duty to give an assurance as to the genuineness of the check, except in respect to the signature of the drawers. If he went beyond this his representation did not bind the bank. Moreover, if the reply made to the question put to him was intended as an affirmation of the genuineness of the body of the check, it was simply an expression of his opinion, and must have been so understood by the person who made the inquiry."

The case at bar is distinguishable from Continental Bank v. National Bank of Commonwealth, 50 N. Y. 575, cited by the plaintiff, in that there the payee relied upon the pronouncement of the teller of the bank that a forged certification of a check was genuine, and the decision of the court, that the circumstances

created an equitable estoppel, was based upon the admission of a fact peculiarly within the knowledge of and which should have been known by the bank upon which the check was drawn, as well as upon a positive assertion upon which the other party had a right to rely and did rely.

In this case, however, it was no part of the clerk's duty to give an assurance as to the genuineness of the body of commercial paper presented for collection, he only being authorized to furnish information regarding its payment or nonpayment.

The other cases cited by the plaintiff have no application to the question under consideration.

Plaintiff further contends that the defendant was guilty of negligence in the matter of giving him notice of the forgery. It is well settled that a person who has received the proceeds of raised commercial paper cannot avoid his liability to refund by showing that, after the loss had occurred, the person seeking to recover was negligent in discovering the forgery, or, after its discovery, in giving him timely notice, unless in the latter contingency it is coupled with proof that he was damaged by such failure to notify him within a reasonable time. National Bank of Commerce v. National Mechanics' Banking Ass'n, *supra:* Corn Exchange Bank v. Nassau Bank, 91 N. Y. 74; Third National Bank v. Merchants' National Bank, *supra.*

There was no proof whatever that the defendant was negligent in giving notice to the plaintiff of the forgery after its discovery; on the contrary, the undisputed evidence shows that the plaintiff was informed by the defendant of the forgery on the day that it first received notice. Moreover, the proofs fail to show that the plaintiff was damaged by delay, if there was any, in receiving notice of the forgery after its discovery.

Rapallo, J., who wrote the opinion in Bank of Commerce v. Union Bank, *supra*, says: "The greater negligence in a case of this kind is chargeable on the party who receives the bill from the perpetrator of the forgery;" and, continuing, the same learned judge says: "The party who fraudulently passed the bill cannot avoid his liability to refund on the pretense of delay in detecting the forgery, or in giving notice of it; and if reasonable diligence is exercised in giving notice after the forgery comes to light, it is all that any of the parties can require." And in the case of Third National Bank v. Merchants' National Bank, above referred to, O'Brien, J., lucidly expressing the reasoning of the court, says:

"But a claim of negligence based upon a failure to discover is very different from one based upon a failure, after discovery, to give notice. A failure to discover, though resulting in loss to another who might, if sooner apprised, have apprehended the forger and recovered the money, gives no right of action, and for obvious reasons, one of which alone need be mentioned. There is no duty imposed on one who receives a forged check from another to unearth the crime. He receives it presuming, as he has a right to do, that all the signatures and indorsements are genuine, which is impliedly warranted by the person from whom it is received. This presumption and the right to rely on this implied warranty is only destroyed when, by inspection, the forgery could be detected because apparent on the face of the check or bill, or where, from the surrounding circumstances, the suspicions of the person receiving the note, check or bill should be aroused and his scrutiny challenged. Not so after discovery, for then the duty is incumbent on the one detecting the imposition to act promptly in giving notice, and if he fails therein to the injury and damage of the one entitled to notice, he will be prevented from recovering the damage or injury shown to have been actually incurred."

There being no proof of the defendant's negligence or lack of reasonable diligence in giving notice of the forgery after its discovery, or, even if such were shown, that any damage was suffered thereby, the plaintiff cannot, in my opinion, avoid his liability to refund.

For these reasons the judgment should be reversed and a new trial ordered, with costs to the appellant to abide the event.

BEEKMAN, P. J., and GILDERSLEEVE, J., concur.

Judgment reversed and new trial ordered, with costs to appellant to abide event.

THE MANHATTAN FIRE ALARM CO., Appellant, *v.* JOSEPH WEBER et al., Respondents.

(Supreme Court, Appellate Term, February, 1898.)

1. **Contract — Obligation — Permitting a fire alarm to remain in a theatre.**

   The mere fact that the lessees of a theatre permitted fire-alarm boxes, placed therein at the instance of a former tenant, to remain upon the

premises, does not impose upon them any liability for the use of the boxes, where there is no proof that the lessees ever requested that they should continue to be maintained.

2. Same — A legal duty performed by another.

Proof that a statute, applicable to a city (Laws of 1882, chap. 410, § 454, as amended by Laws of 1892, chap. 703, § 1), requires theatre proprietors to provide such alarms as board of city commissioners may direct, does not enable a company, furnishing a particular alarm not shown to have been adopted by such commissioners, to recover of the theatre proprietors for its use, under the contention that the corporation has, in the public interest, discharged an obligation which the law imposed upon the theatre proprietors, as the statute itself affords ample authority to the city officials to enforce the law.

APPEAL by the plaintiff from a judgment of the District Court in the city of New York for the first judicial district, rendered in favor of the defendants by the justice thereof, without a jury.

The nature of the action and the material facts are stated in the opinion.

Bostwick, Morrell & Bates (Robert L. Morrell, of counsel), for appellant.

Friend, House & Grossman (Moses H. Gross and Michael Schaap, of counsel), for respondents.

GIEGERICH, J. On the 1st day of September, 1896, the defendants became the lessees of a certain music hall or theatre in the city of New York, in which plaintiff had theretofore installed, for a former lessee, five fire-alarm boxes. These remained upon the premises until the 16th day of September, 1897, when they were removed by the plaintiff, who seeks to recover for having maintained such service during the period mentioned. The defendants contest the claim on the ground that neither of them requested the service and merely suffered the alarm signals to remain upon the premises, pending plaintiff's attempt to secure from them a contract for their maintenance in the future. Plaintiff, while conceding that the defendants did not expressly assent to, or promise to pay for, a continuation of the service, nevertheless bases its right to recover upon the theory that the facts and circumstances of the case bring it within the rule that, where one voluntarily accepts and

avails himself of valuable services, rendered for his benefit, when he has the option to accept or reject them, with knowledge that the party rendering the same expects payment therefor, a promise to pay may be inferred even without distinct proof that they were rendered at his request. Lawson on Contracts, § 34; Benjamin on Principles of Contract, § 18; 1 Parsons on Contracts (8th ed.), 486; Day v. Caton, 119 Mass. 513; 20 Am. Rep. 347; Davidson v. Westchester Gas Light Co., 99 N. Y. 559, 566. The difficulty with this position, however, is that the testimony upon which it is based was contradicted.

At the trial Richard F. Alexander, plaintiff's superintendent, testified that on September 25, 1896, he first called at defendants' place of business and was referred by the defendant Weber to Mr. Teller, defendants' manager; that the latter, on being informed that the plaintiff wished to have a contract signed, said "they (meaning the apparatus) belong to us, everything in the building, we took everything in the building;" but, upon being told that the plaintiff company had merely rented and not sold the alarm signals, he stated that, as he had to see Mr. Miner about other things in connection with the theatre, he would also see him about the one in question, and would let him (witness) know; that, at the same time, he left with Mr. Teller a proposed contract embodying the terms upon which plaintiff was willing to furnish the service; that on October 23, 1896, he again called on Mr. Teller, who, in reply to inquiry, said that he had not as yet seen Mr. Miner about the matter, but did expect to do so; that on March 10, 1897, he again called, and, in the absence of both defendants and Mr. Teller, left another proposed contract, and that on August 9, 1897, and while the location of one of the boxes was being changed by request of defendants' electrician, the following conversation, between the defendant Weber and the witness, ensued:

"Q. What did he say? A. He asked what I was doing, I said 'we are moving the box of this fire alarm.'

"Q. What did he say? A. He said, 'I don't know about it.'

"Q. Did he ask who had ordered it moved? A. I am not certain that he asked that question, but I told him who ordered it moved.

"Q. He did not object to your moving it? A. I said the electrician had ordered it; I said, 'If you don't want it moved, now is the time to say so.'

"Q. What did he answer to that? A. He said 'I suppose it is all right,' or words to that effect, and then walked away."

That the apparatus was inspected at regular intervals was also testified to by him.

Upon cross-examination, the witness testified that neither defendant had requested the putting in or continuing of the apparatus, and that the location of the box was changed while extensive alterations were being made in the music hall.

Albert H. Cross, secretary of the plaintiff company, testified that he mailed several letters to the defendants respecting the matter; that in two of them he inclosed a bill for the service, and that no answer was ever received in acknowledgment of either.

The defendant Weber was called as a witness for the plaintiff and said that he could not say, as a matter of fact, whether fire alarm boxes were in the theatre from September 1, 1896, to September 1, 1897, that he had no personal knowledge whether the law required proprietors of theatres to use the Manhattan fire alarm service, and that, upon the abandonment of the premises by the former lessee, one Krauss, he and his codefendant took possession. Upon cross-examination, he denied that he ever authorized or requested a maintenance of the service.

The defendants called their manager, Leo C. Teller, who testified that he not only never authorized or agreed to pay for the maintenance of the service, and that he never promised Mr. Alexander or anyone else that he would execute, or cause to be executed, a contract therefor, but that he ordered the boxes to be taken out of the theatre and that no bill purporting to be for such service was ever received. On cross-examination he testified that, when Mr. Alexander first called to know whether the defendants "wanted or had some fire apparatus," he (witness) said they "had negotiated an arrangement with Mr. Miner," whom he would see; that the proposed contract was handed to him by Mr. Alexander, who remarked that "they had some fire alarm apparatus there and wanted us (defendants) to make a contract," and that the witness then promised Mr. Alexander that he would make an investigation; after which the latter left with the expressed intention of calling again. He further testified:

"Q. What do you mean when you said you would see Mr. Miner about these boxes? A. So many things came in after Mr. Krauss had left and I said I would see Mr. Miner as to what they were; Mr. Miner told me they paid some of the bills for Mr. Krauss.

"Q. Did you see Mr. Miner about these boxes? A. Yes, sir.

"Q. What did he say? A. He said he had nothing to do about Krauss' bill, and if they wanted money from Krauss to sue Krauss."

The witness also testified that Mr. Alexander never said anything about a bill against Mr. Krauss and sought only to have a contract signed; that witness said he would investigate, and did so; that he did not know the boxes were in the theatre, and never remembered seeing them, and that no inspection was ever made; that, in June, 1897, he told plaintiff's representative (who called with a proposed contract) to remove the apparatus, as the defendants did not desire to make the contract after having learned of its nature. His following redirect examination is affirmative of his direct testimony:

"Q. How many times did you instruct Mr. Alexander or a representative of the corporation to take out these things? A. Once or twice, the last time they called.

"Q. Did you let him believe you would enter into a contract at any time, or wanted the service to continue? A. No.

"Q. You are positive of that? A. Yes, sir."

In rebuttal of this testimony, the plaintiff recalled Mr. Alexander, who testified that on September 16, 1897, he told Mr. Teller he "had come with the contracts and bill, and that we must have it settled, or discontinue the service, that those were my orders," and that the latter replied "to disconnect." Then follows:

"Q. Then you took the boxes out? A. Disconnected, so that they did not work."

It will be seen, from the foregoing narration of the testimony, that the main question presented for solution was one of fact. There was sufficient evidence in the case to support a finding either way. But it was the function of the trial justice to determine on which side the weight of the evidence inclined, or that the evidence did not preponderate in favor of the plaintiff, and, having found for the defendants upon a conflict of evidence, we should not disturb his conclusions. Weiss v. Strauss, 14 N. Y. Supp. 776; Lynes v. Hickey, 4 Misc. Rep. 522.

The plaintiff could at any time have discontinued the service by disconnecting the wires and so rendering the apparatus worthless; but it did not see fit to do so, and merely because of such omission it cannot impose a liability on the defendants, in the absence of their request to maintain it.

Plaintiff further contends that the defendants were under a legal duty to maintain, upon their premises, an apparatus such as

it had installed there, and we infer therefrom that the rule invoked is, that where an obligation is imposed by law upon one to do an act, because of the interest which the public has in its performance, and he fails to perform it, another who performs it, with the expectation of receiving compensation, should be allowed to recover against the former. Keener on Quasi Contracts, 341. The burden, however, is on the person making such a claim to establish the necessity for his intervention, as well as that the act done should have been performed by the person from whom recovery is sought. Id. 347.

In Keener on Quasi Contracts, 349, the learned author says: "To charge a defendant for services rendered in the discharge of an obligation which he, the defendant, should have performed, the plaintiff must establish a necessity for his, the plaintiff's, action. In a case where the reason for the appeal to the plaintiff is the fact that the defendant had failed in his obligation, then no notice is necessary. If, however, the defendant has not refused to discharge his obligation, and his failure to act has been due to his want of opportunity, he must, if he is in a position to act, be given the opportunity before anyone will be justified in acting in his stead."

The Consolidation Act, among other things, provided that "the owners or proprietors of all * * * theatres and music halls * * * shall provide such means of communicating alarms of fire, accident or danger, to the police and fire departments, respectively, as the board of fire commissioners or the board of police commissioners may direct." Laws of 1882, chap. 410, § 454, as amended by Laws of 1892, chap. 703, § 1.

There was no direct proof that the public authorities ever adopted plaintiff's system, but it is fairly deducible, from the letter of February 19, 1897, that it had been installed in some of the theatres in the city of New York by their consent.

There is no pretense whatever that the plaintiff's system was the only one which had received official sanction during the period plaintiff claims to have maintained the service, and, therefore, the defendants were not confined in their choice to the service furnished by the plaintiff. Moreover, the record fails to disclose whether or not any other fire alarm system was provided by the defendants during the period in question. But aside from this there was no necessity for the plaintiff to maintain its service upon the defendants' premises, as the public authorities had ample power

to compel the defendants to discharge the duty which the law imposed (Laws of 1882, chap. 410, § 465, as amended by Laws of 1892, chap. 703, § 3), and hence, even though the evidence might have justified the inference that the plaintiff expected to be remunerated for maintaining the service, it cannot recover upon the ground that it, in the public's interest, discharged an obligation imposed by law upon the defendants. Keener on Quasi Contracts, 344, 347; Force v. Haines, 2 Harr. 385.

For these reasons, to my mind, the judgment should be affirmed, with costs.

BEEKMAN, P. J., and GILDERSLEEVE, J., concur.

Judgment affirmed, with costs.

ABRAHAM BERMAN, Appellant, *v.* ALEXANDER GOLDSAND, Respondent.

(Supreme Court, Appellate Term, February, 1898.)

Trial — Numerical preponderance of witnesses.

The fact that a justice of a District Court of the city of New York decided a question of fact in accordance with the testimony of the defendant, although the plaintiff produced three confuting witnesses, does not indicate that the justice failed to deliberate upon the whole testimony.

APPEAL by the plaintiff from a judgment of the District Court in the city of New York for the ninth judicial district, rendered by the justice thereof, without a jury.

The nature of the action and the material facts are stated in the opinion.

Jacob Marks, for appellant.

Oscar J. Hochstadter, for respondent.

GIEGERICH, J. This action was brought to recover the sum of $157.75, alleged to be due for goods sold and delivered to the defendant. The pleadings are in writing. The answer denies that the goods were sold, and alleges that they were delivered on

memorandum and remained the property of the plaintiff, to be paid for by the defendant when sold, or, if not sold, to be returned, and that in accordance with that agreement, the defendant did return to the plaintiff goods to the value of "eighty odd dollars."

At the trial there was a sharp conflict of evidence upon the issues of fact thus raised, and the justice, in rendering judgment for the defendant, decided, "that the goods were not sold, but were delivered on memorandum, remaining the property of the plaintiff, to be paid for by defendant when sold, and if not sold to be returned by defendant to plaintiff;" and he further held that, although the defendant was indebted to the plaintiff in the sum of $25 or thereabouts, the proceeds of other sales, that that could not be recovered in the present form of action because no sale of the goods had taken place, they being merely left upon the conditions before stated.

Plaintiff claims, substantially, that the judgment is against the weight of evidence, yet a careful perusal of the record justifies us in the contrary conclusion. The agreement, under which the defendant claims the goods were left with him on memorandum, was proven not alone by his own testimony, but by that of two additional witnesses. Certainly the entire oral and documentary evidence respecting the alleged spoliation of the $35 check, given by the defendant to the plaintiff in part payment for goods sold under said agreement, should be considered by the justice as a circumstance, at least in determining the weight of conflicting testimony upon the main issues of fact in the case. The mere fact that three witnesses testified that the words "acc. on mem." were not upon the check when it was delivered to plaintiff, as against the defendant's own testimony in diametrical opposition thereto, is not, as claimed by the plaintiff, a manifest indication that the justice neglected to deliberate upon the whole testimony. The justice, having had the witnesses before him, was undoubtedly better able to judge of their credibility and of the weight to be given to their testimony than is this appellate court, and hence we see no reason for disturbing his conclusion, in the absence of the elements which are requisite to a review of the facts. Lynes v. Hickey, 4 Misc. Rep. 522.

Plaintiff also claims to have been taken by surprise by the altered condition of the check presented upon the trial, and now asserts his ability to establish by expert testimony that the words in question were written in the body of the check after it had

been punctured or file-marked by the bank upon which it was drawn. A close scrutiny of the record, however, fails to show that the plaintiff pleaded surprise, or requested an adjournment to procure expert testimony; on the contrary, it clearly appears that he elected to proceed with the trial, that he and two other witnesses called by him testified as to the condition of the check, and that he then submitted the case to the justice. He thereby took the hazard of a trial, hoping, no doubt, that the justice would not believe the defendant's story regarding the check, and now, that the issues have been decided adversely to him, he applies to this court for relief.

Even aside from the question of our power to grant the relief asked, we think that under the circumstances a new trial should not be granted for the reasons already mentioned. The justice having found that there was no sale of the goods, his conclusion as to the remedy, to recover the balance of the moneys in defendant's hands, is in all respects correct.

The judgment, should, therefore, be affirmed, with costs.

BEEKMAN, P. J., and GILDERSLEEVE, J., concur.

Judgment affirmed, with costs.

JAMES S. MORGAN, Respondent, *v.* HENRY M. ENRIGHT et al., Appellants.

(Supreme Court, Appellate Term, February, 1898.)

Trial — Weight of evidence.

A justice of a District Court of the city of New York can determine, better than the Appellate Court, the weight which should be attached to the testimony of witnesses and his conclusion will not be disturbed unless he has made a mistake, or has been influenced by bias, passion, prejudice or corruption, or has manifestly neglected to deliberate upon the whole testimony.

APPEAL by the defendants from a judgment of the District Court in the city of New York for the eleventh judicial district, rendered by the justice thereof, without a jury.

The nature of the action and the material facts are stated in the opinion.

Albridge C. Smith, for appellants.

Dillon & Barrett, for respondent.

GIEGERICH, J. The action was brought to recover the sum of $144, alleged to have been loaned by the plaintiff to the defendants between the 2d day of June, 1897, and the 12th day of August, 1897. The pleadings are in writing. The defendants answered separately, but the answers are similar in all respects, each admitting that no part of the sum sued for has been paid, while denying each and every allegation of the complaint.

At the trial there was a sharp conflict of evidence upon the issues thus raised, which the justice resolved in plaintiff's favor by rendering judgment against the defendant May McKenzie Enright for $164.37, damages and costs, but dismissing the complaint as to the defendant Henry Enright.

The justice, having had the witnesses before him and observed their conduct and demeanor while testifying, was undoubtedly better able to judge of their credibility and determine the weight to be attached to their testimony than is this appellate court, and we should not disturb his conclusion, unless the evidence is of such a convincing character as to clearly indicate that there was a mistake on the part of the justice; or that he had been influenced by bias, passion, prejudice or corruption; or that he had manifestly neglected to deliberate upon the whole testimony. Dempsey v. Paige, 4 E. D. Smith, 218, 219; Lynes v. Hickey, 4 Misc. Rep. 522. A close scrutiny of the record does not lead to such a conclusion.

Although decided in his favor, Mr. Enright has joined his wife in an appeal from the judgment rendered, which, evidently, is due to an oversight. His codefendant essays to reverse the judgment solely upon the facts; but as we cannot discover any ground for disturbing the justice's determination, the judgment should be affirmed, with costs.

BEEKMAN, P. J., and GILDERSLEEVE, J., concur.

Judgment affirmed, with costs.

WILLIAM WETTERER, Landlord-Respondent, *v.* ANDREW SOUBIROUS, Tenant-Appellant.

(Supreme Court, Appellate Term, February, 1898.)

1. **Summary proceedings — Eviction.**

An eviction is a defense to summary proceedings to recover the possession of premises for the nonpayment of rent.

2. **Excavations in the city of New York — Rights of licensee.**

Semble, that a licensee, of an adjoining owner of lands in the city of New York has, under the Consolidation Act (Laws of 1882, chap. 410, § 474), a right to maintain timbers which he has thrust through the basement wall of the adjoining owner, in order to make an excavation on his own lot, until the time when he has built up a new wall which will so support the wall of the adjoining owner "that it shall remain as stable as before the excavations were commenced."

3. **Summary proceedings — Attornment.**

It is not necessary that a tenant should attorn to his landlord in order that the latter may maintain summary proceedings.

4. **Same — Ouster of jurisdiction by plea of title.**

The provisions of section 2956 of the Code of Civil Procedure, relative to the ouster of a justice's jurisdiction upon the interposition of a plea of title, have no application to summary proceedings.

APPEAL by the tenant from a final order, in summary proceedings to recover the possession of real property for nonpayment of rent, made by the justice of the District Court in the city of New York for the sixth judicial district, in favor of the landlord, upon a trial had without a jury.

The material facts are stated in the opinion.

Horace A. Davis, for appellant.

Rose & Putzel (Gibson Putzel, of counsel), for respondent.

GIEGERICH, J. These proceedings were based upon the nonpayment, after demand, of a monthly installment of rent alleged to be due from the tenant-respondent to the landlord-appellant on the 1st day of November, 1895, under a written lease of the house and premises known as No. 294 Sixth avenue in the city of New York, made and executed by John L. Tonnele, as trustee under the

last will of John Tonnele, deceased, to the tenant-appellant, for the term of three years from May 1, 1891, at the yearly rental of $1,700, payable monthly in advance, and a written extension thereof from the 1st day of May, 1894. The petitioner-respondent, in his petition, alleged that the lease was assigned to him. The allegation was denied by the tenant-appellant in his answer, in which he also averred that Gerson Siegel was his landlord, and, denying the other allegations of the petition, he set up an actual eviction from a part of the demised premises. While the latter defense is available in summary proceedings to recover the possession of demised premises for nonpayment of rent (Hamilton v. Graybill, 19 Misc. Rep. 521), the same has not, in my opinion, been sustained. In July, 1897, it became necessary to make excavations for building purposes on the land, north of the demised premises, to a depth of more than ten feet, and one Patrick Norton, the contractor having charge of said excavating, entered upon the premises in question and inserted numerous needles or sticks of timber through the basement wall for the purpose of shoring up and holding it in position, while he excavated for the foundation wall to be erected on the adjoining land.

It is claimed by the tenant-appellant that, from the month of August, 1897, to the hearing of these proceedings, the northerly wall of the basement was largely cut away and the floor and doors blocked with timber; that in consequence of this the under-tenant occupying the basement abandoned the same and the tenant-appellant was deprived of the use thereof; all of which acts, it is further insisted, constitute an actual eviction from a part of the demised premises.

There was, however, testimony adduced upon the trial which warranted the justice in finding (as is assumed from the final order), that the acts complained of were done by the said contractor under the express sanction of the tenant-appellant and the tenant who occupied the basement. But the tenant-appellant contends, furthermore, that, even, if license to enter the demised premises was granted, it was the duty of the petitioner's assignor, Mr. Siegel, to proceed with reasonable dispatch and to perform the job in a good and workmanlike manner and with as little injury and inconvenience as possible to the tenant-appellant and the under-tenant. This undoubtedly would have been his duty had he, at the time, been the owner of the adjoining premises and caused the excavation to be made, but the record, to my mind, fails to

show any such fact. Even assuming, but without so holding, that the evidence affords an inference that Mr. Siegel was such owner and the person who caused the excavation to be made, he nevertheless had the right, under said license, to proceed and build up the new wall so as to sustain the northerly wall of the building upon the demised premises, and, for that purpose, had the right to enter upon so much of the tenant-appellant's premises as was necessary, before he could be required to remove the needles from the same. Ketchum v. Newman, 116 N. Y. 422, 427. The foundation for the new wall was only in the course of erection at the time of the hearing of these proceedings, and the licensee, therefore, could not be compelled to withdraw the needles from the wall of the demised premises; his right to maintain such, as we have seen, continued until he had built up a new wall which would sustain the northerly wall of the demised premises and so that the latter should "remain as stable as before the excavations were commenced." Laws of 1882, chap. 410, § 474.

The tenant-appellant also claims that said Gerson Siegel, and not the petitioner-respondent, was the landlord of the premises in question when the rent was demanded and the proceedings were brought; but this contention is not supported by the evidence, from which it appears, on the contrary, that the lease was assigned by Mr. Siegel to the petitioner-respondent, prior to the time before mentioned, by an instrument in writing dated September 30, 1895. The petitioner-respondent was, therefore, the real party in interest, and whether or not he was a "dummy," as claimed, is of no moment. Sheridan v. Mayor, 68 N. Y. 30; Curran v. Weiss, 6 Misc. Rep. 138.

Upon the trial, the petitioner-respondent offered in evidence an assignment of the lease, dated February 10, 1891, executed by John L. Tonneli, as trustee under the will of John Tonneli, deceased, together with a certificate of acknowledgment. This was objected to by the tenant-appellant on the ground that thirty seconds prior thereto the paper had not been acknowledged. Counsel for the petitioner-respondent thereupon stated that "the paper was all complete with the exception of the notary affixing the signature. He is in court here and will testify that he took the acknowledgment early this morning." The justice overruled the objection, the paper was admitted in evidence, and the tenant-appellant noted an exception. There is nothing in this objection; for the acknowledgment of the execution of a written instrument

may be made even after the action has been commenced and at any time before it is actually offered in evidence. Holbrook v. New Jersey Zinc Co., 57 N. Y. 616, 624; Abbott's Trial Evidence, 6.

It was not necessary, as claimed by the tenant-appellant, for him to attorn to the petitioner-respondent in order to have enabled the latter to maintain these proceedings. Sloane on Landlord & Tenant, 80. The written demands for the payment of rent, which had become due on the 1st days of October and November, 1897, respectively, and which were served upon the tenant-appellant on behalf of the petitioner-respondent, gave notice to him of the claim of the latter respecting the demised premises; and the fact that rent was due for the last-mentioned month of its nonpayment was amply proven.

The tenant-appellant contends, furthermore, that it appeared upon the trial, from the petitioner's own showing, that the title to real property was in question and was disputed by the tenant, and hence that the complaint should have been dismissed pursuant to section 2956 of the Code of Civil Procedure. The record fails to show that the tenant-appellant delivered to the justice an answer, or filed the undertaking required by section 2952, or that he claimed upon the trial that the title to real property was in question; but, even had he complied with all these prerequisites, the justice would not have been ousted of jurisdiction, as the provisions of the Code, respecting the answer of title, are confined to actions and have no relation to summary proceedings. Matter of White, 12 Abb. N. C. 348; People ex rel. Baldwin v. Goldfogle, 23 Civ. Pro. 417. As was said by Mr. Justice O'Brien in the last cited case, "The question in summary proceedings is, whether the relation of landlord and tenant exists. The question of title cannot arise, the one presented being as to the right to possession, and the decision simply determines who is entitled to the possession, and cannot in any way affect title to land."

For these reasons, to my mind, the final order appealed from should be affirmed, with costs.

BEEKMAN, P. J., and GIEGERICH, J., concur.

Order affirmed, with costs.

WILLIAM WETTERER, Landlord-Respondent, *v.* ANDREW SOUBIROUS, Tenant-Appellant.

(Supreme Court, Appellate Term, February, 1898.)

Former determination.

The question, whether a former summary proceeding is a bar to a subsequent one, cannot be determined where the record on appeal does not contain the judgment-roll in either of the proceedings and where the court is in possession of the judgment-roll is one proceeding only.

MOTION for a reargument of an appeal from a final order in summary proceedings.

Horace A. Davis, for appellant.

Rose & Putzel, for respondent.

PER CURIAM. This is an appeal from a final order, made in summary proceedings, to recover possession of the house and premises known as No. 294 Sixth avenue, in the city of New York, for nonpayment of one month's rent, which it is alleged became payable on the 1st day of March, 1896. The defense was a general denial, eviction, and that the alleged transfer of title, by one Gerson Siegel to the respondent, was fraudulent and void.

Summary proceedings, theretofore brought to recover possession of the premises in question for nonpayment of the rent due November 1, 1895, resulted in favor of the above-named respondent; but in the proceedings had for nonpayment of the January, 1896, rent, the jury rendered a verdict in favor of the above-named appellant.

Although the judgment-roll in each proceeding was admitted in evidence, the return is barren of either the original record of the judgments, or a copy thereof. The judgment-roll in the first-mentioned proceeding was submitted to us when the appeal from the final order therein was argued, but, in the absence of the record of the other proceeding, we are unable to determine whether the judgment therein is *res adjudicata*.

The brief submitted by the appellant's counsel has no application whatever to the case at bar, it relating solely to the proceedings had for the rent of February, 1896, and not the following month, for which these proceedings were instituted.

For these reasons a reargument must be ordered, the return to be amended meanwhile.

Present: BEEKMAN, P. J., GILDERSLEEVE and GIEGERICH, JJ.

Reargument ordered, return to be amended.

MAX BERMAN, Respondent, *v.* JACOB ZUCKERMAN et al., Appellants.

(Supreme Court, Appellate Term, February, 1898.)

Bills and notes — Diversion — Burden upon bona fide holder.

Where the defendants have proved that a note has been wrongfully diverted from the purpose for which it was given, the plaintiff, in order to constitute himself a bona fide holder, must prove that he took the note in good faith and without knowledge of the wrongful diversion.

APPEAL from a judgment of the Fifth Judicial District Court.

A. B. Schleimer, for appellants.

Joseph Wilkenfield, for respondent.

PER CURIAM. The judgment should be reversed for the reason that, when the defendants showed that the note had been wrongfuly diverted from the purpose for which it had been given, the plaintiff did not sufficiently re-establish his position as a *bona fide* holder to entitle the justice to find that he took the note in good faith and without knowledge of the wrongful diversion. See American Bank v. N. Y. Packing Co., 148 N. Y. 698. In this connection, attention is called to the fact that there was evidence given by defendants tending to show that the plaintiff himself was present at the time that the defendants arranged with Lunitz for the terms upon which the note was to be delivered to Samuelson. The plaintiff, when subsequently put on the stand, was not asked whether he was so present at that time, nor was any evidence given by him tending to contradict the testimony that had been given by the defendants. This, we think, should have been given.

We also think that the justice should have allowed the question, put to plaintiff on cross-examination, "Where did you get these fifty dollars?"

Judgment appealed from reversed, and a new trial ordered, with costs to appellants to abide the event.

Present: BEEKMAN, P. J., GILDERSLEEVE and GIEGERICH, JJ.

Judgment reversed and new trial ordered, with costs to appellants to abide event.

ALFRED C. GARSIA, Appellant, *v.* T. HAMILTON BURCH, Respondent.

(Supreme Court, Appellate Term, February, 1898.)

Jurisdiction of the Appellate Division over unfinished business of the Court of Common Pleas.

The Appellate Division has succeeded to the powers of the General Term of the Court of Common Pleas for the city and county of New York, and consequently, the Appellate Term has no power to direct the entry of an order, affirming a judgment of a District Court of the city of New York upon the opinion of the General Term of the Court of Common Pleas, the entry of which order had inadvertently been neglected until after the consolidation of the courts by section 2 of article 6 of the Constitution of 1894.

MOTION for the settlement and entry of an order directing the affirmance upon an appeal taken to the General Term of the Court of Common Pleas of a judgment of the Sixth Judicial District Court in favor of defendant.

Fromme Bros., for motion.

James W. Hawes, opposed.

PER CURIAM. This action was brought in the District Court of the city of New York for the sixth judicial district. Upon a trial judgment was awarded in favor of the defendant, from which judgment an appeal was taken to the General Term of the Court of Common Pleas for the city and county of New York. The minutes of the General Term show that on the 5th day of February, 1894, an opinion was rendered by Mr. Justice Bookstaver, which was concurred in by the other justices sitting at that term, directing an affirmance of the judgment, with costs. Through some inadvertence no order of affirmance was ever entered, and this

motion is now made to the Appellate Term for the settlement and entry of such an order.

We think that the objection to our authority to entertain this motion is well taken. Until an order of affirmance should be entered, the matter was still pending in the General Term of the Court of Common Pleas, and was, therefore, undisposed of business of that branch of the court at the time when the consolidation of the court took place. By section 2 of article 6 of the Constitution it is provided, among other things, that "from and after the last day of December, 1895, the Appellate Division shall have the jurisdiction now exercised by the Supreme Court at its General Terms, and by the General Terms of the Court of Common Pleas for the city and county of New York," etc. This constitutional provision was supplemented by an act of the Legislature, entitled "An act in relation to the Supreme Court in the first judicial district and the Appellate Division thereof in the first department." Chap. 553, Laws of 1895. By section 17 of that act it is provided that "All the powers conferred by law upon the General Term of the Supreme Court in the first judicial department, upon the General Term of the Superior Court of the city of New York, and upon the General Term of the Court of Common Pleas for the city and county of New York, are conferred upon and vested in the Appellate Division of the Supreme Court in the first department. And all the powers conferred by law upon the Supreme Court in the first judicial district, upon the Superior Court of the city of New York, and upon the Court of Common Pleas for the city and county of New York, other than as courts of first instance in actions and special proceedings, are also conferred upon and vested in said Appellate Division."

It seems plain, therefore, that whatever unfinished business remained in the General Term of the Court of Common Pleas at the time that court was abolished was transferred to the Appellate Division of the Supreme Court. The Appellate Term (so-called) of the Supreme Court exists by virtue of an exercise of authority conferred by the Constitution upon the Appellate Division (Art. 6, § 5), which provides that "appeals from inferior and local courts now heard in the Court of Common Pleas for the city and county of New York, and the Superior Court of Buffalo, shall be heard in the Supreme Court in such manner and by such justice or justices as the Appellate Divisions in the respective departments which include New York and Buffalo shall direct, unless otherwise

provided by the Legislature." The Appellate Division in the first department has made its designation of three justices to hear such appeals, and has made rules governing their action. We are unable to discover any authority conferred upon us to take any action giving formal effect to a decision upon an appeal which was not taken to the Supreme Court and which was not heard by us. The decision in the case of Biel v. Randell, 20 Misc. Rep. 335, was based upon an entirely different state of facts. Relief should be sought at the Appellate Division in this department, which has succeeded to the powers of the General Term of the Court of Common Pleas. The motion must, therefore, be dismissed for lack of power. Motion dismissed.

Present: BEEKMAN, P. J., GILDERSLEEVE and GIEGERICH, JJ.

Motion dismised.

Matter of the Application of THOMAS W. KEOGH to Discharge Lien.*

(Supreme Court, New York, Special Term, July, 1897.)

Foreign corporation as surety — Presumption of solvency.

A foreign corporation, duly authorized to become surety upon bonds, which has submitted to the examination prescribed by statute (Laws of 1893, chap. 720, as amended by Laws of 1895, chap. 178), which has been found solvent and is shown to be so by a subsequent statement duly filed by it with a county clerk, will be presumed to continue solvent and must, in the absence of proof of facts which overcome that presumption, be accepted as a surety upon bonds given to discharge a lien.

MOTION to compel the City Trust, Safe Deposit & Surety Company of Philadelphia, a foreign corporation, duly authorized to transact business in the state of New York, to submit to an examination as to its solvency upon motion for justification.

Townsend & McIlvaine, for motion.

Dayton & Swift, for Surety Company, opposed.

SMYTH, J. The objection to the sufficiency of the amount "fixed" by this court as the penalty of the bonds proposed to be

*Received too late for insertion in proper place.— [Rep.

given in these matters cannot be sustained. The lienor's remedy, if any, is by motion to increase the amount so "fixed." The objection to the justification of The City Trust Safe Deposit & Surety Company of Philadelphia, the surety upon said bonds, in my opinion, is not well taken. It appears by the examination of the vice-president and general manager and agent of the company in this city and state, that the company has been duly authorized by the insurance department of this state to transact the business of "Fidelity and Guarantee Insurance" therein, said company having complied with the laws of this state. It further appears that it has submitted to an examination before a referee appointed by this court as to its solvency, pursuant to the provisions of chapter 720, Laws of 1893, as amended by chapter 178, Laws of 1895, and that upon such inquiry and examination, it was found and so reported to the referee, to be solvent. The report of the referee was duly confirmed by this court, and, subsequently to the confirmation of the referee's report, the company has filed a sworn statement, showing its condition down to the 30th of April, 1897. By this statement it appears, that said company at the date thereof was perfectly solvent and no suggestion is made that its condition is at this time otherwise than solvent. By section 4 of the act of 1893, as amended by section 2 of the act of 1895, it is provided that such statement and examination when filed with the clerk of this county, shall be received and considered as given in justification upon any and all bonds and undertakings or other instruments executed or guaranteed by such company, and it appearing by the statements and examination of the company that it is solvent, it seems to me that, before I would be justified in refusing to approve and accept the bonds in question, sufficient facts should be presented by the objections to overcome the presumption of the present solvency of the company and to call upon the court in the exercise of its discretion to direct further justification either limited to any particular matter relative to the condition of the company or generally No such facts having been presented, the justification must be deemed sufficient and the bonds be accepted and approved.

Ordered accordingly.

Ross C. SCOTT, as Executor of the last Will and Testament of WILLARD IVES, Deceased, Plaintiff, *v.* LUCINA M. IVES et al., Defendants.

(Supreme Court, Jefferson Special Term, February, 1898.)

1. **Bequest of more than one-half of an estate to charitable, etc., corporations — Status of foreign corporation.**

A testator is prohibited from devising to any corporation, which comes within the definition of chapter 360 of the Laws of 1860, more than one-half of his property, and this, regardless of the status of the corporation, either as to the provisions of its charter or as to the laws of the state of its domicile; as the prohibition of the statute is directed against the testator and not against the corporation.

2. **Same — Declarations of a wife to an attorney that she would not contest her husband's will — Code Civil Procedure, § 829.**

Proof, that, after a testator had been informed by his attorney that he had made a will which offended against chapter 360 of the Laws of 1860, his wife was summoned, that the imperfections of the will were explained to her and that she, after objecting to the provision made for her, told the attorney that she would not contest the will and that he, about the same time, prepared a codicil which cut off her bequests if she made a contest, does not establish any valid agreement upon her part not to contest the will, nor one made upon a valid consideration; and the evidence of the attorney, as to the wife's declarations, is, as a privileged communication, properly excluded under section 829 of the Code of Civil Procedure.

3. **What is a contest of a will — Estoppel of beneficiary by conduct.**

Proof, that a widow did not contest a will and codicil of her husband when they were offered for probate, that she continued to live in a house upon a farm in which she had been devised a life interest, that, in the absence of action by the executor, she made arrangements for the occupation of the farm by a tenant, that she accepted, but without prejudice to her rights to contest the will, some semi-annual payments of an annuity given her by it, and that, upon being made a defendant in an action brought by the executor to construe the will, she raised the question whether it was valid under chapter 360 of the Laws of 1860, does not establish the fact that she has contested the will and, by its terms, has thereby precluded herself from taking under it; nor has she estopped herself, by her conduct, from questioning the validity, under said statute, of certain bequests to religious, charitable, etc., institutions.

THIS action is brought to obtain a construction of certain provisions of the last will and testament, and codicil thereto, of Willard Ives, deceased, and for instructions to the executor.

Smith & Smith, for plaintiff.

Rogers & Atwell, for defendant Lucina M. Ives.

G. S. & H. L. Hooker, for G. S. Hooker, as guardian *ad litem*, for Florence M. Howes et al.

John Conboy, for Mary Bliven.

Bradley Winslow, for Jennie H. Smith et al.

W. A. Nims, for American Bible Society et al.

B. A. Field, for defendant Elmer T. Hall.

Kellogg & Cobb, for defendant Emily Foot.

Purcell & Carlisle, for defendants J. A. White et al.

E. R. Wilcox, for defendants George H. Hall et al.

I. L. Hunt, for defendant Julia A. Weidman.

MCLENNAN, J. Willard Ives, who resided in the city of Watertown, Jefferson county, New York, died on the 19th day of April, 1896, leaving neither father, mother, sister, brother, child or descendant of any child, but left a widow, the defendant Lucina M. Ives. At the time of his death he was about 90 years of age, and his widow was about 77 years of age. He left a last will and testament which bears date October 17, 1891, and a codicil thereto which bears date February 17, 1896. By said will and codicil, Mr. Ives assumed to dispose of his entire estate, consisting of both real and personal property, and amounting in the aggregate to about $175,000. The real estate constituted a very small part of the estate, and did not exceed in value the sum of $10,000.

By the will the testator bequeathed to his wife, Lucina M. Ives, the use of a farm of the value of about $5,000, during her natural life; also the personal property thereon or connected therewith, ab-

solutely, but which amounted to only a few hundred dollars. He also bequeathed to her an annuity of $1,000, $500 to be paid semi-annually during her natural life, and he directed his executors to select such securities belonging to his estate, or to invest such sum as would be sufficient to pay such annuity. All the rest, residue and remainder of his estate he bequeathed to the "following institutions, to be permanently invested by each of said institutions, and the income of such several investments to be used in the manner to be determined by the several boards of trustees of said institutions, and each of said investments shall be styled The Willard Ives Fund, namely:

"The American Bible Society, 25 per cent. of my estate, including both real and personal property.

"The Missionary Society of the Methodist Episcopal Church, 25 per cent. thereof.

"The Ives Seminary, 15 per cent. thereof.

"The Freedmen's Aid Society of the Methodist Episcopal Church, 10 per cent. thereof.

"The Methodist Episcopal Hospital in the city of Brooklyn, 5 per cent. thereof.

"The American University, 5 per cent. thereof.

"The Union Missionary Training Institute, 5 per cent thereof.

"The Board of Church Extension of the Methodist Episcopal Church, 5 per cent. thereof."

The will further provided as follows:

"And it being my intention to dispose by this will of all my estate, real and personal, I hereby give and bequeath any and all residue and remainder of my property that may not have been disposed of by the foregoing paragraphs of this will, to the several institutions hereinbefore named, in the same ratio and proportion by which I have made the several bequests to them severally hereinbefore."

And it further provided:

"And in case any of said institutions or corporations shall not accept or shall be incapable of taking under this will, then I give what would otherwise have gone to such corporation or corporations to the other corporations named, in the ratio and proportion by which I have made the several bequests to them severally."

By the said will the testator appointed the defendant Lucina M. Ives, his wife, and the plaintiff, Ross C. Scott, of Watertown,

N. Y., executors, and clothed them with the power of sale in the following language:

"And I hereby authorize them to sell and convey, by proper deeds, any and all of my real estate or to contract for the sale of the same, and to lease the same or any part thereof, and for the purposes of this will, reserving always, however, the life estate hereinbefore created in favor of my beloved wife. And I authorize them to convert my property into money, or to deliver to said institutions securities and stocks at their market value, in payment of the said several legacies in part or in full, upon their election to receive the same. My said executors may select from my securities sufficient of stock and securities to yield the said semi-annual payments of $500 to my said wife, or make investments for that purpose."

It is evident that the testator by the will as thus made, intended that his wife, the defendant Lucina M. Ives, should have the use of the farm above referred to, during her natural life; that she should have the personal property upon said farm and connected therewith, the household furniture, etc., absolutely; and that in addition she should have $500 semi-annually during her natural life, to be derived from the income of securities owned by the testator, or to be derived from investments made by his executors out of his property. The balance of his estate then remaining, if any, or remaining after the death of his wife, whether consisting of real or personal property, he devised to the several institutions above named, according to the percentages therein named, and that if any of said institutions were for any reason incapable of taking, the institutions capable of taking were to receive the share of the institutions incapable of taking, in proportion to the percentages named in the will.

As before said, on the 15th day of February, 1896, the said Willard Ives executed a codicil to his said will, in and by which he revoked and annulled the bequests to the Ives Seminary and the Union Missionary Training Institute, contained in said will, and in place thereof assumed to bequeath to the Ives Seminary the sum of $30,000 by the following language:

"By this my codicil to my last will and testament, I give to the Ives Seminary located at Antwerp, Jefferson county and state of New York, an institution of learning incorporated by the Board of Regents of the state of New York, the sum of thirty thousand ($30,000) dollars, to be safely invested by the said Ives Seminary,

and the income thereof to be applied for the benefit of the said Seminary, so long as and upon the condition that said Seminary shall be in good faith recognized and supported as a Seminary under the charge and supervision of the Conference of the Methodist Episcopal Church, within whose jurisdiction said Seminary shall be. The Board of Trustees of said Seminary shall invest said moneys in good, safe, income-paying securities, and keep the principal sum unimpaired, and the income thereof shall be applied according to the directions of the said Board of Trustees. In case the said Conference of the Methodist Episcopal Church shall at any time cease to exercise supervision over said Seminary, and shall cease to give to the same moral support, this bequest shall terminate, and in such case I give and bequeath absolutely said principal sum to the American University, named and described in my will at paragraph 2, subdivision 6."

And in addition to the annuity of $1,000, $500 to be paid semi-annually, bequeathed to his wife, the defendant Lucina M. Ives, he gave to her by the codicil an additional sum of $500, payable semi-annually during her natural life, which would make her annuity the sum of $2,000 per annum, the payment of such annuity to be secured in the same manner as provided in and by the will.

The said codicil also contained this provision:

"All bequests to my said wife in my will and in this codicil shall not take effect if for any reason she contests my will or this codicil; but I do not expect she will object to the plan of my will and codicil, and I have always believed her to be in sympathy with my benevolent designs. I hereby, as modified by this my codicil, ratify my last will and testament as aforesaid, and as so ratified my will and this codicil express my clear purpose that my property shall forever benefit the good."

It is clear that the purpose of the testator by his will, as modified and changed by the codicil, was that his wife, the defendant Lucina M. Ives, should have the use of his farm, situated in Jefferson county, New York, during her natural life; that she should have absolutely the personal property upon said farm or connected therewith, the household furniture, etc.; and that she should have annually an income of $2,000 during her natural life, to be paid to her from the income of securities from his estate, or from investments made by his executors from the avails of his estate; and that then the Ives Seminary should have $30,000, and that the other in-

stitutions above named should receive the remainder in the proportions named in the will, and that, after the decease of his said wife, the farm and the property or securities from which the annuity of $2,000 a year to her was to be derived, should be distributed between such institutions above named, except the Ives Seminary, in accordance with the percentages named in the will; and that if any of said institutions named were incapable of taking, that the institutions capable of taking would receive the share of the institution or institutions incapable of taking, in the proportion named in the will.

The said will and codicil were duly admitted to probate without objection on the 30th day of July, 1896, and the plaintiff duly qualified as sole executor, the other executor named in the will, the defendant Lucina M. Ives, having refused to qualify. The plaintiff as sole executor brings this action to obtain a construction of the will and codicil, and the widow the defendant Lucina M. Ives, the institutions named as legatees above named, also the heirs and next of kin of the testator, are all made parties defendant.

It is urged on behalf of the widow, Lucina M. Ives, and on behalf of the defendants the heirs and next of kin of the testator, that the bequests to the institutions above named, in excess of one-half of the estate of the testator, are void under chapter 360 of the Laws of 1860, and that as to such one-half of his estate Willard Ives died intestate. The attorney for the institutions above named insists that the bequests to them are valid to the full extent of the personal property at least, for the reason that the widow is estopped from questioning the provisions of the will, and that she has elected to take under the will. This is also the contention of the plaintiff.

It is also contended that certain institutions are not affected by the statute of 1860, and that, therefore, under the provisions of the will, such institutions are entitled to take the share or the proportion of the share which would have gone to the institutions which are subject to the provisions of the statute in case such act applies.

The act of 1860 above referred to, provides as follows:

"No person having a wife shall by his or her last will and testament devise or bequeath to any benevolent, charitable, literary, scientific, religious or missionary society or corporation, in trust or otherwise, more than one-half of his or her estate, after the pay-

ment of his or her debts, and such devise or bequest shall be valid to the extent of one-half and no more."

It is conceded that the defendants, the American Bible Society, the Missionary Society of the Methodist Episcopal Church, the Ives Seminary, the Methodist Episcopal Hospital, in the city of Brooklyn, and the Board of Church Extension of the Methodist Episcopal Church, fall within the provisions of the act of 1860, but it is urged that the defendants, the Freedmen's Aid Society of the Methodist Episcopal Church, and the American University, being foreign corporations, and there being no inhibition in their charter against taking by devise any part of the testator's estate, the statute is not operative as to them, and that, therefore, the property of the testator, in excess of one-half, should go to said two institutions under the residuary clause of said will.

Concededly, all of the institutions named in the will are either benevolent, charitable, literary, scientific, religious or missionary in their character, and so come within the provisions of the act of 1860. The fact that the two institutions, the Freedmen's Aid Society of the Methodist Episcopal Church and the American University are foreign corporations, or that their charter or the laws of the state of their domicile do not restrict them in the matter of receiving or taking bequests, is of no consequence.

This was expressly held in the case of Amherst College v. Ritch, 151 N. Y. 282. At page 333 the court say, per Vann, J.: "The statute in question (the act of 1860) is not a mortmain act. The policy of the state upon the subject appears in a few general and many special statutes passed at various times. The Revised Statutes present an example of the former when they provide that 'no devise to a corporation shall be valid unless such corporation be expressly authorized by its charter or by statute to take by devise.' 2 R. S. 57, § 3. The charters of various corporations illustrate the other class of legislation by limiting the amount they can take by devise or otherwise. Matter of McGraw, 111 N. Y. 66, 107. The object of all these statutes is to 'prevent accumulations of property in the hands of institutions which take no part in the productive activity of the community.' They act upon the power of corporations to take and hold, not on the power of a testator to give. The authorities relied upon by the appellants are to a great extent judgments pronounced when these statutes, thus expressing the policy of the state against the concentration of wealth *in mortua manu*, were under consideration by the courts.

The decisions under the mortmain acts of England are equally inapplicable, when the difference between those acts and the act of 1860 is borne in mind. That statute (act of 1860) is of a different character from any of those mentioned. It does not prevent charitable corporations from taking, but forbids a testator who has a wife, child or parent from giving more than one-half of his estate after the payment of his debts. Chamberlain v. Chamberlain, 43 N. Y. 424, 440. It does not prohibit charitable gifts altogether, but only under certain circumstances, to a certain extent and by a certain method. If the gift is not made by will, or if made by will and the testator leaves no surviving relative of the degree named, or it is to charities other than those mentioned, there is no prohibition. It does not compel a testator to leave his property or any part thereof to relatives. It does not prevent him from giving all that he has to charity during his lifetime. It is aimed simply at the giving of an undue proportion to charity by will, when certain relations have, in the opinion of the legislature, a better claim.

"As was said by Judge Allen in Chamberlain v. Chamberlain, 43 N. Y. 424, 440: Its object 'was to prevent a person upon whom others standing in near relation had claims, from disappointing their just expectations and disinheriting them from pious or philanthropic motives, and the intent was to include all public objects, whether religious, charitable or literary.' Its theory is not to keep property away from charitable corporations, but to prevent a testator from giving more than one-half of his net estate at the expense of his wife, child or parent. Its sole purpose is to protect those natural objects of his bounty from improvident gifts to their neglect."

It would seem, therefore, upon authority, that each of the defendants, associations or corporations above named, are subject to the restrictions of the act, and that they cannot receive under the will of the testator to exceed in the aggregate one-half of the property of which he died seized, and this regardless of the fact that some of such associations or corporations may have been organized under the laws of a foreign state, and that their charters or the laws of such state may not in any way have limited their right to receive bequests of the character in question.

In other words, it would seem to be the settled law of this state, that a testator is prohibited from devising to any corporation which comes within the definition of the act of 1860, more than

one-half of his property, regardless of the status of such corporation, either as to the provisions of its charter, or as to the laws of the state in which it is domiciled; that the statute is not aimed against the associations or corporations, but is against the testator, and prohibits him in case he has a wife, child, etc., from devising more than one-half of his property to any benevolent, charitable, scientific or missionary society.

It would seem, therefore, independent of any other fact or consideration, that Willard Ives died intestate as to all of his property in excess of one-half of the same, and that if there were no other considerations the personal property would go to his widow, the defendant Lucina M. Ives, and the real estate to his heirs and next of kin.

It is urged, as before suggested, on behalf of the plaintiff, and also on behalf of the associations above named, that the defendant Lucina M. Ives is estopped from claiming under the will of the testator, in excess of the amount bequeathed to her, for the reason, first, that she assented to the provisions of the will and codicil made by the testator, and agreed not to contest the same; and second, because she has accepted the benefits under such will, and, therefore, is estopped from objecting to the same.

It, therefore, becomes important to determine what was the attitude of the defendant Lucina M. Ives, in respect to the will and codicil in question. The will was made and executed in the ordinary way, so far as appears. The testator was informed by the attorney who drew the will that its provisions might be annulled or modified by reason of the act of 1860. Notwithstanding such information on the part of his attorney, he insisted on making the will in question. He was told, apparently, in order that the institutions named as defendants might receive the bequests named in the will, that it would be necessary that no one should contest the same. In other words, that the provisions of the will were illegal, and that any one interested was competent to have such illegality declared. It also appears that he was informed that he could intrust his property to his executor, relying upon the good faith and integrity of his executor to carry out his, the testator's, intention in respect to his property, but without any directions so to do; that the testator, under all the circumstances, decided to make the will as it now is.

After such will was prepared and executed, and when the testator was sick and his life despaired of, the attorney who prepared

the will, and who was the confidential adviser of the testator, sent for his wife, the defendant Lucina M. Ives, and explained to her the imperfections in the will under the statute, and stated that such provisions could not be effectual unless she consented thereto. It is offered to be proved in this case by the attorney that the widow, the defendant Lucina M. Ives, thereupon stated to the attorney who had sent for her, that she was satisfied with the provisions of the will, and that in no case would she raise any objections to the same. Upon the trial it was held that such evidence was incompetent under section 829 of the Code of Civil Procedure, upon the ground that it was a privileged communication, and that notwithstanding the fact that she, the wife, had not employed the attorney, but because she was sent for and consulted by him as attorney, in respect to her rights under the provisions of her husband's will, that what she said upon that occasion respecting her rights and interest under such will, were privileged communications.

A careful examination of the authorities cited has led me to the conclusion that the holding was correct, and that such evidence should not be permitted in the case.

It was also offered to be shown that at the time the codicil in question was made, the testator and his wife, in the presence of the attorney, had a conversation in which the provisions of the will and of the codicil were discussed; that the defendant Lucina M. Ives insisted that more ample provisions should be made for her, but that when that was denied her by the testator, she said in substance that under no circumstances would she contest or object to his purposes in the distribution of his property.

It is believed that such evidence was immaterial for any purpose in this case; that it is not competent by oral agreement to make a will different from that expressed by the formal instrument. In other words, it is sought by oral conversation to establish a will in contravention of the statute, and evidently with the intent of the evasion of the statute. If the purpose of the statute, as has been said, is to prevent a person when approaching death, under religious fervor or excitement, from disposing of his property for religious purposes to the exclusion of his kindred, then it is equally important that the wife or child should be protected against such influences as might induce her, in the presence of death, to assent to the consummation of such purposes.

It is believed, and so held, that the conversations between the attorney and the defendant Lucina M. Ives, so far as material upon

any issue in this case, were privileged communications, and, therefore, properly excluded upon the trial.

It is not pretended that any valid agreement was made between the testator and his wife, in regard to the provisions of his will. Certainly no consideration passed to her to support such agreement At the most, he told her he was going to do just what he did do in respect to his property. She objected; declared in substance that he ought to make more ample provision for her. But when she found he was determined, she said in substance that he might do as he liked; that she would not interpose any objection. That the testator did not rely upon such statement is clear from the words of the codicil: "But I do not expect she (my wife,) will object to the plan of my will and codicil, and I have always believed her to be in sympathy with my benevolent designs."

These words clearly indicate that no agreement had at that time been made between the testator and his wife, that she would not object to the plan of his will and codicil. It is further evident that no secret trust was created. The testator did not give to his wife any property, or add to or omit from his will or codicil any clause or provision on account of the fraud or misrepresentation of his wife. She made no promise or suggestion as to what she would or would not do, in case any part of the estate came to her. A secret trust has never been declared under such circumstances. It cannot be said that any act or word of the wife induced the testator to make the will he did make. On the contrary, she urged him not to make it. She practiced no fraud; made no statement which induced him to act; made no promise which he relied upon; and it is, therefore, held that the conversation sought to be given by the attorney for the testator was immaterial. as bearing upon any of the issues involved in this action.

By the original will the testator bequeathed to the defendant, the Ives Seminary, 15 per cent. of his entire estate, and the balance of his estate was bequeathed to the other institutions named in the will. By the codicil he gave to Ives Seminary $30,000, and to the remaining institutions named in the will the balance of his estate according to the percentages named therein. There is nothing to indicate that the purpose of the testator was changed in respect to the Ives Seminary, to the extent, at least, of providing that it should have the full amount of $30,000, independent of what sum the other institutions might take. It is believed that as the bequests to the other institutions must of

necessity, under the provisions of the statute of 1860, be reduced one-half, that the bequest to Ives Seminary should also be reduced one-half.

It is not believed that the defendant Lucina M. Ives is estopped from taking under the will, by reason of her attitude in respect to it, or in respect to this litigation. When the will and codicil were offered for probate she made no objection; she commenced no action to have the will or any of its provisions declared void. The executor, as before stated, commenced this action, and made her a defendant. She then, through her counsel, made certain suggestions by her answer and upon the trial, which would present the legal questions involved, uniting substantially with the plaintiff in asking that the provisions of the will and codicil be interpreted in accordance with the laws of the state. This is not a contest on her part, within the meaning of the will, and she is, therefore, not precluded from taking under its provisions.

Neither has her action in respect to the property since the decease of the testator, in any way disqualified her from asserting her full rights. She continued to live in the house and upon the farm where the testator died, the use of which, by the terms of the will, she was given during her natural life. The term for which the farm was rented having expired, and the executor having neglected to make arrangements with another tenant, she assumed to do so with his full consent and authority. In other words, she made arrangements by which the farm of which she was given the life use, should be cared for, looked after and cultivated in a proper manner. Certain of the semi-annual payments had been made to her by the executor, but always, as appears by the evidence, under the express understanding and agreement between her and the acting executor, that the receipt of such payments by her should in no way affect her rights under the will, or to the property of the testator.

It follows that the exact amount of the property, both real and personal, of which the testator died seized, should be determined; that the amount of the costs allowed and directed to be paid out of the estate should be deducted from the entire amount of such property; that one-half of the remainder of the estate should go to and be paid to the following institutions named in the will, to-wit:

Fifteen thousand dollars to Ives Seminary.

Twenty-five seventy-fifths of the remainder of said one-half to the American Bible Society.

Twenty-five seventy-fifths thereof to the Missionary Society of the Methodist Episcopal Church.

Ten seventy-fifths thereof to the Freedmen's Aid Society of the Methodist Episcopal Church.

Five seventy-fifths thereof to the Methodist Episcopal Hospital in the city of Brooklyn.

Five seventy-fifths thereof to the American University.

Five seventy-fifths thereof to the Board of Church Extension of the Methodist Episcopal Church.

It will be observed that after giving to Ives Seminary the $15,000, only 75 per cent. of the one-half of the testator's property is specifically devised by percentages, and that the remainder of said one-half, to-wit: 25 per cent., is to be divided in the same proportion and so on as to each remainder indefinitely, but clearly it was the intention of the testator to dispose of his entire estate, and, therefore, it is proper that the one-half of the testator's property remaining after the payment of the bequest to Ives Seminary, should be distributed among the other institutions named. This result it is believed is accomplished in the manner above stated.

All of said bequests to said institutions above named should be paid out of the personal property of the testator. The balance of the personal property of which the testator died seized, after paying the bequests above named, should be paid to the widow, Lucina M. Ives. The widow is also entitled during her natural life to the use of the farm of the testator, situate in the city of Watertown, Jefferson county, N. Y., and she is also entitled to receive the personal property upon said farm and connected therewith, the household furniture, etc., absolutely. All of the real estate of which the testator died seized, belongs to and should go to the defendants, the heirs and next of kin of the testator mentioned and described in the complaint, and after the death of the defendant Lucina M. Ives, the said farm described in the complaint should also go to and belong to said heirs and next of kin.

If the parties to this action do not agree as to the value of the personal property of which the testator died seized, or as to the value of the real estate of which he died seized, further proof may be taken upon that question, or a referee may be appointed to take the evidence in respect thereto.

Ordered accordingly.

MEMORANDA

OF

CAUSES NOT REPORTED IN FULL.

CITY COURT OF NEW YORK, GENERAL TERM, DECEMBER, 1897.

JOHN R. WALKER, Respondent, *v.* LUCIUS H. BIGELOW et al., Appellants.

APPEAL from judgment entered upon a verdict directed by the court, and from an order denying a motion for a new trial.

Thomas Darlington, for appellants.

Joseph M. Williams, for respondent.

O'DWYER, J. Judgment and order appealed from affirmed, with costs.

CONLAN, J., concurs.

Judgment and order affirmed, with costs.

CARL V. SCHOONMAKER, Respondent, *v.* THOMAS A. ENNIS et al., Appellants.

APPEAL from a judgment entered upon a verdict of a jury, and from an order denying a motion for a new trial.

Foley & Wray, for appellants.

C. L. Harwood, for respondent.

O'DWYER, J. Judgment and order appealed from affirmed, with costs.

CONLAN, J., concurs.

Judgment and order affirmed, with costs.

Matter of MAURICE B. BLUMENTHAL, as Receiver, Etc., Respondent, *v.* SIMON BUTTNER, Appellant.

APPEAL from an order of the Special Term.

Howard A. Sperry, for appellant.

Solon Berrick, for respondent.

O'DWYER, J. Order appealed from affirmed, with costs.

CONLAN, J., concurs.

Order affirmed, with costs.

MAX FLICKER, Appellant, *v.* LOUIS GRAUER, Respondent.

APPEAL from a judgment in favor of defendant, and from an order denying a motion for a new trial.

A. H. Berrick, for appellant.

Charles G. F. Wahle, for respondent.

O'DWYER, J. Judgment and order appealed from affirmed, with costs.

CONLAN, J., concurs.

Judgment and order affirmed, with costs.

DORA M. THOMAS, Respondent, *v.* CHARLES F. RISLEY, Appellant.

APPEAL from a judgment entered by direction of the court, and from an order denying a motion for a new trial.

Theodore H. Friend, for plaintiff.

John A. Crow, for defendant.

Per Curiam. Judgment affirmed, with costs.

Present: CONLAN and O'DWYER, JJ

Judgment affirmed, with costs.

VICTORIA PAPER MILLS CO., Judgment Creditor, Respondent, *v.* MAX CASHRIEL, Judgment Debtor, Appellant.

APPEAL from an order directing the testimony taken in supplementary proceedings to be filed by this court.

Joseph A. Arnold, for appellant.

Herman Herst, Jr., for respondent.

Per Curiam. Order appealed from affirmed, with costs.

Present: CONLAN and O'DWYER, JJ.

Order affirmed, with costs.

CITY COURT OF NEW YORK, GENERAL TERM, FEBRUARY, 1898.

ELLA TOAL, Appellant, *v.* ANDREW SOHER, Respondent.

APPEAL from an order of the Special Term, opening a default.

Hardy & Shellabarger, for appellant.

William Hildreth Field & Deshon, for respondent.

FITZSIMONS, Ch. J. I think that the Special Term justice, upon the papers submitted to him herein, was justified in opening defendant's default.

Such papers, in my opinion, presented sufficient cause for so doing. The terms imposed, I think, were insufficient; in addition to such terms the plaintiff should have been allowed all disbursements incurred by her.

The order appealed from is modified to that extent, and as so modified, is affirmed, without costs.

CONLAN, J., concurs.

Order modified, and as so modified, affirmed, without costs.

ANTONIO DONADIA, Appellant, *v.* OTTO MENZE, Respondent.

APPEAL from an order vacating an attachment.

Frank W. Angel, for appellant.

F. L. Gilbert, for respondent.

CONLAN, J. This is an appeal from an order vacating an attachment on the ground that the affidavit does not comply with the requirements of subdivision 3 of section 3169 of the Code of Civil Procedure.

We think the language employed brings the case fully within the meaning and spirit of the section quoted, and that the order appealed from should be reversed. Order reversed with costs.

FITZSIMONS, Ch. J., and SCHUCHMAN, J., concur.

Order reversed, with costs.

THEOPHILE HERZOG, Respondent, *v.* EDWARD J. H. TAMSEN, as Sheriff, Etc., Respondent, and LOUIS S. FIRETAG et al., Appellants.

APPEAL by Louis S. Firetag and Abraham Firetag from so much of an order granting a motion made by them for leave to intervene as parties defendant, as requires them to furnish security for costs.

Aaron Morris, for appellants.

O'DWYER, J. The right of the appellants to be brought in as parties defendant is absolute, and this being so, the court cannot require security for costs as a condition for granting such right. Uhlfelder v. Tamsen, 18 Misc. Rep. 173; 40 N. Y. Supp. 372.

It follows that that part of the order appealed from should be reversed, with costs.

FITZSIMONS, Ch. J., concurs.

Order reversed, with costs.

JOHN MENKE, Respondent, *v.* EDWARD J. H. TAMSEN, as Sheriff, Etc., Respondent, and LOUIS S. FIRETAG et al., Appellants.

APPEAL by Louis S. Firetag and Abraham Firetag from so much of an order granting a motion made by them for leave to intervene as parties defendant, as requires them to furnish security for costs.

Aaron Morris, for appellants.

O'DWYER, J. Part of order appealed from reversed, with costs. See Uhlfelder v. Tamsen, 18 Misc. Rep. 173; 40 N. Y. Supp. 372; Herzog v. Tamsen, and others, decided at this term.

FITZSIMONS, Ch. J., concurs.

Order reversed, with costs.

KNICKERBOCKER ICE CO., Respondent, *v.* JOHN HENRY THEISS, Impleaded, Appellant.

APPEAL from a judgment in favor of plaintiff, entered upon a verdict.

Fromme Bros., for appellant.

Daly, Hoyt & Mason, for respondent.

Per Curiam. The jury, upon the evidence submitted, was certainly justified in finding that John Henry Theiss and his brother George composed the firm of G. Theiss & Brother, at the time of the transaction in question, and, therefore, the judgment herein must be affirmed, with costs.

Present: FITZSIMONS, Ch. J., CONLAN and SCHUCHMAN, JJ

Judgment affirmed, with costs.

FREDERICK T. MASON, Appellant, *v.* FREDERICK TIETIG, Respondent.

APPEAL from an order resettling a case on appeal.

C. H. & J. A. Young & Terry, for appellant.

James S. Schmaier, for respondent.

Per Curiam. In view of the order entered on the 17th instant on the appeal from the order directing a resettlement of the case on appeal, the appeal must be heard at the next General Term.

Present: FITZSIMONS, Ch. J., and CONLAN, J.

Appeal ordered heard at next General Term.

THE WEEHAWKEN WHARF CO., Respondent, *v.* THE KNICKERBOCKER COAL CO., Appellant.

APPEAL from an order vacating an attachment.

Edwards & Bryan, for appellant.

James R. Rogers, for respondent.

Per Curiam. This is an appeal from an order denying the defendant's motion to vacate the attachment upon the original papers. The order appealed from must be affirmed, with costs. The papers upon which said attachment was granted were more than sufficient.

Present: FITZSIMONS, Ch. J., O'DWYER and MCCARTHY, JJ.

Order affirmed, with costs.

LIST OF DECISIONS — NO OPINIONS.

SUPREME COURT, APPELLATE TERM, FEBRUARY, 1898.

Before BEEKMAN, P. J., GILDERSLEEVE and GIEGERICH, JJ.

Ferdinand Kerber, Respondent, v. Nathaniel Niles, Appellant.—Appeal from a judgment of the General Term of the City Court, affirming a judgment in favor of plaintiff entered upon a verdict, and from order denying motion for a new trial. Henry T. Brennan, for Appellant. Alfred and Charles Steckler, for Respondent. Judgment affirmed, with costs.

Anton Swoboda, Respondent, v. The Metropolitan Street Railway Company, Appellant.—Appeal from a judgment of the General Term of the City Court, affirming judgment in favor of plaintiff entered upon a verdict. Henry A. Robinson, for Appellant. M. P. O'Connor, for Respondent. Judgment affirmed, with costs, upon argument.

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See **Executors and Administrators.**

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AGENCY.

1. Action by insurance agent for premiums—General denial—Right to sue—Implied authority to collect premiums.—Where it appears, in an action brought by an insurance agent to recover a premium alleged to be due him, that his company in a foreign state issued to the defendant, through him a policy which was handed to the defendant by a broker who collected and receipted for the premium and subsequently absconded, the interposition of a general denial puts in issue the right of the plaintiff to sue and also raises the question whether the plaintiff, by intrusting the policy to the broker, had not given him implied authority to collect the premium. Lounsbury v. Duckrow, 434.

2. Right of agent to sue.—An agent cannot, merely as such, sue to collect moneys due his principal and where he proves no assignment nor right of subrogation, his action cannot be maintained. Id.

3. Power of attorney to make notes.— Where a principal gives her agent a broad power of attorney to give negotiable paper in her name, she is liable upon a note which the attorney made in her name to himself as payee, and which he, so far as appeared, not for his own benefit, subsequently indorsed and delivered to the holder in consideration of his delivery of securities to the agent, upon which the latter received money. Eldridge v. Husted, 534.

4. Extent of an agent's power—Ratification.—A person dealing with an agent is bound to inquire as to the extent of his authority; and a principal cannot be held to have ratified the act of its agent unless it had full knowledge of the facts ratified. Miner v. Edison Electric Ill. Co., 543.

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APPEAL.

1. What may be considered.—The Appellate Term cannot, upon appeals from the City Court of New York city, consider the weight of evidence, but merely exceptions taken upon the trial. Bogan v. Wright, 94.

2. Error cured.—Error in excluding evidence is cured by its subsequent admission. Van Dyke v. Gardner, 113.

3. **Costs — Collusive separation of answering defendants.**— Where the plaintiff claims that the defendants have answered separately merely to tax separate bills of costs, she must show that their interests were identical and the severance collusive; and where that question is, upon a motion for a retaxation of costs, decided adversely to her, the resulting order, involving a question of discretion, is not appealable to the Appellate Term. Wolf v. Di Lorenzo, 323.

4. **Review of questions of law where there is a short decision.**— A case on appeal need not show affirmatively that it contains all the evidence in order to authorize the court to review a question of law; and an exception filed to a concise decision, made by a referee under the Code of Civil Procedure, § 1022, justifies a review of the facts contained in the record in order to determine the propriety of a ruling, denying a motion for a nonsuit made upon the ground that the evidence did not show a cause of action, as this raises only a question of law. Miner v. Edison Electric Ill. Co., 543.

5. **From Appellate Term to Appellate Division — Leave -- Newly designated Appellate Term.**— The provisions of the Constitution of 1894 (art. 6, § 5), and of the Code of Civil Procedure, § 1344, are applicable to the Appellate Term of the Supreme Court, and an application to it, for leave to appeal to the Appellate Division, is properly made at the next term after the decision was rendered, and this although, because of a new designation of justices, its members did not render the decision sought to be reviewed. Curtin v. Metropolitan Street Railway Co., 586.

6. **To the Appellate Term — Weight of evidence not considered.** — The Appellate Term cannot, on appeals from the City Court of the city of New York, consider the weight of evidence. Matter of Blumenthal, 704.

7. **Trial — Numerical preponderance of witnesses.**— The fact that a justice of a District Court of the city of New York decided a question of fact in accordance with the testimony of the defendant, although the plaintiff produced three confuting witnesses, does not indicate that the justice failed to deliberate upon the whole testimony. Berman v. Goldsand, 735.

8. **Weight of evidence.**— A justice of a District Court of the city of New York can determine, better than the Appellate Court, the weight which should be attached to the testimony of witnesses and his conclusion will not be disturbed unless he has made a mistake, or has been influenced by bias, passion, prejudice or corruption, or has manifestly neglected to deliberate upon the whole testimony. Morgan v. Enright, 737.

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ARREST.

Affidavit.— The sufficiency of an affidavit for an order of arrest considered. Wandelt v. Burnett, 315.

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ASSAULT.

1. **Former conviction of the plaintiff for an assault on the defendant.**— Where a person brings an action against a police officer to recover damages for an assault and battery alleged to have been committed upon

him by the officer, while taking the plaintiff from his residence, where he had had a disturbance with his wife, to the station-house, the officer cannot, in his own defense, prove the record of the conviction, in a Police Court, of the plaintiff for an assault made upon him while he was conveying the plaintiff to the station-house on the night in question, as the record of a conviction for a crime is not admissible in a civil action to prove the fact upon which it was rendered. Ennis v. Dudley, 4.

2. Words accompanying an assault — Damages.— A complaint for an assault and battery may properly include slanderous words, spoken by the plaintiff to the defendant, at the time of the assault, as these characterize its malicious intent and proof of them is competent upon the question of damages. Delmage v. Crow, 511.

ASSIGNMENT.

1. Of a bond, mortgage and guaranty of collection — Right of assignee to enforce an agreement, contained in the guaranty, that the guarantor would take a reassignment.— Where a bond and mortgage and a guaranty of payment and collection, executed to the holder by one who had sold the bond and mortgage to her, and who, in the instrument of guaranty, had agreed to take a reassignment of them at the amount due and upon demand made, are, after default by the guarantor both upon the promise to pay and also upon that to take a reassignment, duly assigned by the owner and holder under a written instrument which, after assigning the bond and mortgage, also assigns a "written guaranty of payment and collection," it will be deemed to have been the intention of the parties that all rights under the whole instrument of guaranty should pass to the assignee, and he, therefore, may enforce, against the guarantor, the cause of action created by the breach of his promise to take a reassignment of the bond and mortgage. Van Dyke v. Gardner, 113.

2. Cross-examination of assignee as to his ownership.— Where the plaintiff proves a valid assignment to himself of a cause of action, it is not erroneous to deny the defendant the right to cross-examine the plaintiff as to his ownership. Id.

ASSIGNMENT FOR THE BENEFIT OF CREDITORS.

1. Domestic assignment by insolvent foreign corporation — Conflict of laws — Estoppel.— Where a corporation, incorporated in a foreign state, where an insolvent corporation is forbidden to make any assignment of its property, carries on business and subsequently makes a general assignment in the state of New York, containing no preferences other than those to employees, a creditor, resident in this state, and which is also the depositary of the funds of the general assignee, is, after the making of a final decree to which it was a party, and under which it would receive a distributive share, estopped from bringing an action, in order to levy by attachment upon the funds of the general assignee, upon the theory that the assignment in this state is void because it conflicts with the laws of the foreign state relative to assignments by insolvent corporations. First National Bank v. Rock City Falls Paper Co., 599.

2. Compromise of claims — Liability for rent.— An assignee for the benefit of creditors cannot compromise a demand against the estate of the assignor; and hence where he has, against the protest of the assignor, although under the authority of an ex parte order, secured the cancellation of a lease, under which the assignor was tenant, by the payment of a sum of money to the lessor, the payment must be disallowed upon his accounting.

Semble, that the lessor could prove the rent due up to the time of distribution and come in for his share of the assets, but whether he could claim the whole rent reserved by the lease for the entire term, quaere. Matter of Ludeke, 676.

3. Counsel fees.— The charges of an assignee for legal expenses should appear in his account, and be pre-

sented under oath, in the same manner as all other expenses of the trust. Id.

See **Partnership.**

ATTACHMENT.

Irregularities should be specified in an order to show cause why an attachment should not be vacated. — *Semble*, that an order requiring the plaintiff to show cause why an attachment which it has obtained, should not be vacated, must specify the irregularities of which the defendant complains. Weehawken Wharf Co. v. Knickerbocker Coal Co., 559.

See **Evidence.**

ATTORNEYS.

Compensation — Percentage on renewal lease.— Where landowners agree to give attorneys, as a compensation for their services in procuring a leasing of their lands, by the commissioner of public works of the city of New York, for the purpose of a temporary bridge, 10 per cent. of all rentals received by them from the city, and a lease is made with the city for the period of three years " with the privilege of two renewals of one year each upon the same terms and conditions," the attorneys, or their assignors, become entitled to 10 per cent. upon a renewal lease, made upon the part of the city and in the exercise of its option, as the renewal is not an independent leasing but is a mere continuation of the preceding term. Bogan v. Wright, 94.

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See **Summary Proceedings.**

BAIL.

1. Laches of judgment creditor in pursuing judgment debtor.— Where a judgment creditor does anything to prevent, or fails to do anything to procure, the proper service of an execution against the person of a judgment debtor, it is the duty of the court to protect his bail and, to that end, direct the issue of a further execution, and also to permit them bail, in an action brought against them by the judgment creditor, to surrender the debtor to the sheriff. Stransky v. Harris, 15.

2. Surrender of principal — Issue of new execution.— The sureties on an undertaking upon an order of arrest may surrender the defendant, their principal, at any period before the expiration of the time to answer in an action brought upon the undertaking, or afterwards where the time to answer has been extended by the court; but where they have failed to do so, as alleged, because they were ignorant of their rights, the court has no power, after the lapse of five months from the time when judgment was recovered against them in an action upon the undertaking, to direct the plaintiff, upon the motion of one of them, to issue a second execution against the person of the defendant in order to lay a foundation for his surrender in exoneration of the surety. Stransky v. Harris, 691.

3. Default — Supplemental answer setting up matters subsequent.— While the court has power to open the default of a surety and to extend his time to surrender his principal, it should not give him general authority to serve an amended or supplemental answer " setting forth such matters as may have occurred in said action," as under such a permission he might plead matters not yet in existence and which might never occur. Id.

BAILMENT.

1. For an indefinite term — Termination — Notice to bailor.— A bailment for storage, for an indefinite time, is terminable at the will of either party; and where the bailee notifies the bailor that he refuses to continue longer as bailee and gives the bailor an opportunity to obtain the subject of the bailment, the bailee is released. Emerald & Phoenix Brewing Co. v. Leonard, 120.

2. Waiver of tort in selling the thing stored.— Where the bailor

brings an action against the bailee as for goods sold and delivered, he waives the alleged tortious act of the bailee in selling to another the subject of the bailment, and cannot maintain therefor an action for a conversion. Id.

BANKS.

See **Negotiable Instruments.**

BAR.

1. **Another action pending — When another cause of action need not be pleaded by the defendant.**— Where the plaintiffs bring an action for the conversion of the proceeds of a single consignment of cigarettes alleged to have been intrusted to the defendant for sale on commission, the defense of another action pending is not made out by proof of another action, pending in the City Court of New York, a court of record, brought by the defendant against the plaintiffs, in which he seeks to recover commissions as their agent during a term of five years upon various sales made by him, as the rule is that, where the first action is commenced in a court of record, the defendant need not usually interpose, as a counterclaim, a cause of action which he may have against the plaintiff, but may bring an independent action therefor. Notara v. De Kamalaris, 337.

2. **Release — Duress.**—Whether a release of a cause of action was executed under duress is a question for the jury, and if they find duress, the release is not a bar. Delmage v. Crow, 511.

3. **Former determination.**—The question, whether a former summary proceeding is a bar to a subsequent one, cannot be determined where the record on appeal does not contain the judgment-roll in either of the proceedings and where the court is in possession of the judgment-roll in one proceeding only. Wetterer v. Soubirous, 743.

See **Master and Servant.**

BATTERY.

See **Assault.**

BENEFIT SOCIETIES.

1. **Cannot, by subsequent by-laws, affect the vested right of a member to designate any beneficiary he pleases.**— Where the right of a member of a benefit society to designate a beneficiary is unrestricted at the time when a certificate of insurance was issued to him, it cannot be affected, so as to defeat a recovery upon the certificate, by by-laws subsequently enacted by the Supreme Lodge of the order declaring, generally, that the beneficiary must be a member or members of his family or must be one related to him by blood or a person who shall be dependent upon him. Spencer v. Grand Lodge, A. O. U. W., 147.

2. **Power to pass retroactive by-laws.**— Quaere, whether the Supreme Lodge of such a benefit society has power to enact subsequent legislation which would practically abrogate existing certificates which were valid in their inception? Id.

3. **By-law requiring a notice of arrearages — Insufficient verbal notice.**— Where the by-laws of a benefit society provide that a member indebted for two months' dues shall be notified by the financial secretary, that when a member owes three months' dues he shall be considered in arrears, and that he will not be eligible to benefits until three months after all arrearages are paid, the company cannot successfully resist a recovery upon a policy whose arrearages for three months were paid by the insured ten days before his death, unless it proves that the financial secretary notified him in writing, when his dues were two months in arrears, of that fact; nor, assuming that a verbal notification would be sufficient, is such a notification made out by proof that the financial secretary told him, about the time when he was two months in arrears, that he had better "square his account." Shafer v. United Brotherhood of Carpenters, 363.

BICYCLES.

See **Negligence.**

BILL OF PARTICULARS.

Requisites — When denied.— A bill of particulars should not be ordered in an action, based upon the alleged negligence of a corporation operating a street railroad, and consisting in the collision of its motor with a carriage in which the plaintiff was driving, unless it specifically appears, from the motion papers, that the defendant has not the means of obtaining the information required, and that the defendant ought to have whatever knowledge may be in the possession of the plaintiff, in order to prevent its being surprised upon the trial of the action. Villiers v. Third Avenue Railroad Co., 17.

See **Pleading.**

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See **Conversion.**

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BONDS.

1. Action by prior lienor upon a bond of contractors, discharging the lien — Appeal by the owner in an action by the contractors, where the prior lien was established — Construction of bond.— A common-law action may be maintained by a prior lienor against the sureties upon a bond given by contractors and conditioned to pay any judgment which the lienor may recover against the property, affected by the lien, upon a foreclosure of it; but where the owner of the property duly appeals from a judgment, rendered in an action brought against him by the contractors and, among other things, establishing the prior lienor's lien at a definite sum, the appeal makes premature an action brought by the lienor upon the bond while the appeal is pending, as the judgment which the bond was intended to secure must be deemed to have been only a judgment which was absolutely final. Heagney v. Hopkins, 549.

2. Foreign corporation as surety — Presumption of solvency.— A foreign corporation, duly authorized to become surety upon bonds, which has submitted to the examination prescribed by statute (Laws of 1893, chap. 720, as amended by Laws of 1895, chap. 178), which has been found solvent and is shown to be so by a subsequent statement duly filed by it with a county clerk, will be presumed to continue solvent and must, in the absence of proof of facts which overcome that presumption, be accepted as a surety upon bonds given to discharge a lien. Matter of Keogh, 747.

BROKERS.

1. Commissions — Waiver of limitation of order of sale of houses — Attempt to defraud broker.— Where an owner, who has contracted with a real estate broker to sell her houses in a particular order, subsequently, by her husband and agent, agrees, that if the broker sells any one of the houses to a particular purchaser with whom he had been negotiating, he shall have commissions, the original limitation as to the order of sale must be deemed to have been waived; and proof that the broker subsequently sold one of the houses to the purchaser in question, although the title, in order to defraud the broker of his commissions, was taken in the name of a third person, entitles the broker to recover commissions of the owner. Randrup v. Schroeder, 365.

2. Commissions.— Brokers who have been the procuring cause of a sale of real estate are entitled to commissions. Hobbs v. Edgar, 510.

3. Commissions.— Where a person employs real estate brokers to dispose of real property he is liable to them, upon their performance, whether the title to the property is in his name, or in that of his wife. Whiting v. Saunders, 539.

4. A broker may, by consent, act for both sides.— A real estate broker may, by consent, act for and receive commissions from both parties to an exchange of real properties. Id.

CALENDAR.

Striking case from calendar for irregularity — Laches.— The delay of a defendant, in waiting until a case has appeared for the second time on the calendar, before moving to strike it therefrom for the failure of the plaintiff, after the service of an amended answer, to serve a new notice of trial, and file another note of issue, is a waiver of the irregularity. Levey v. Tribune Association, 245.

CARRIERS.

Money of a passenger not necessary for travel.— A common carrier is not liable to a sleeping-car passenger, from Detroit to New York, for the loss of $1,250, of which he had retained custody, and which he intended, upon subsequently reaching the city of Boston, to deposit in a bank, as such a large sum of money cannot be regarded as necessary or reasonable expenses of the trip. Williams v. Webb, 513.

CASE.

On appeal — Resettlement.— The Special Term of the City Court of the city of New York may direct a trial justice to resettle a case on appeal, if he deems it proper to do so, but it cannot direct him to resettle it in a manner specified in the order of resettlement. Mason v. Tietig, 557.

CERTIORARI.

See **Taxes.**

CHAMPERTY.

1. Conveyances of land adversely possessed — Grants to holder of the legal title.— The statute (1 R. S. m. p. 739, § 147), forbidding conveyances of land adversely possessed, does not prevent the holder of the legal title, although not a perfect one, from procuring further conveyances in support of his existing title.— Lambert v. Huber, 463.

2. Void conveyances to a tenant. — Where a tenant takes, from strangers to the title and whom he knew to be out of possession, deeds of a part of an alley used by his landlord to gain access to his premises and also of a small part of the landlord's lot, abutting on the alley, the tenant intending to construct a building thereon and thereby block up the alley, his acts are in bad faith, he, as tenant, is estopped from questioning his landlord's title, he becomes a trespasser and the deeds to him are void under the above statute, forbidding conveyances of lands adversely possessed. Id.

CHARGE.

See **Trial.**

CHATTEL MORTGAGE.

Subsequent purchasers — Conversion — Assignment of cause of action.— The provisions of the statute relative to chattel mortgages (Laws of 1895, chap. 354, § 1, amending Laws of 1833, chap. 279, § 3), protecting subsequent purchasers in good faith of mortgaged property, where there has been a failure to refile the mortgage, do not protect one who purchases on the day before one year from the date of the first filing, as the word "subsequent" means after the date when the mortgage should have been refiled; and hence the assignee of a mortgagee, who has been refused possession by such a purchaser, may maintain an action against him for a conversion. Wolff v. Rausch, 108.

See **Fraudulent Conveyances.**

CITY COURT OF ALBANY.

See **Summary Proceedings.**

CITY COURT OF NEW YORK.

Substituted service of the summons — Affidavits.— The provisions of the Code of Civil Procedure, § 436, relative to the substituted service of the summons, apply to the City Court of the city of New York, and where affidavits, submitted upon such an application, show that the

defendant cannot, after diligent effort, be found at her alleged residence in that city, and that no information as to her whereabouts can be obtained, an order for substituted service is properly granted. Molloy v. Lennon, 542.

See **Appeal.**
Contempt.

CIVIL SERVICE.

See **Veterans.**

CLUBS.

Lease of a part of a building — When such a club cannot give exhibitions, for which tickets are sold to the public.—The provisions of the Horton Law (Penal Code, § 458), permitting sparring exhibitions, with proper gloves, to be held by a domestic incorporated athletic association in a building leased by it, for athletic purposes only, for at least one year, are not violated by the fact that such an association does not occupy, under lease, an entire building but merely rents a portion of its third floor, while the rest of the building is occupied by other tenants; but such an association, incorporated under the Membership Corporations Law (Laws of 1895, chap. 559), cannot give sparring exhibitions, for which admission tickets are sold to the public at large; and this, although the tickets, in order to avoid the effect of the statute, are denominated upon their face, "Membership Ticket." People v. Johnson, 150.

CODE OF CIVIL PROCEDURE.

§ 14, subd. 3. Matter of Blumenthal, 704.
§ 382, subd. 7. Matter of Warner v. Bartle, 488.
§ 414. Matter of Warner v. Bartle, 488.
§ 428. Smith v. Keteltas, 588.
§ 436. Molloy v. Lennon, 542.
§ 439. Brandow v. Vroman, 370.
§ 500, subd. 2. Von Hagen v. Waterbury Mfg. Co., 580.
§ 522. Bernstein v. Crow, 99.
§ 723. Hulbert Bros. & Co. v. Hohman, 248.
§ 724. Jospe v. Lighte, 146.
§ 730. Fischer v. Cohen, 117.
§ 738. Hackett v. Edwards, Merrill & Co., 659.
§ 829. Flaherty v. Herring-Hall-Marvin Safe Co., 329, 749.
§ 999. Flanagan v. Callanan, 139.
§ 1022. Miner v. Edison Electric Ill. Co., 543.
§ 1187. Mixsell v. New York, New Haven & Hartford R. R. Co., 73.
§ 1326. Swan v. Mutual Reserve Fund Life Assn., 256.
§ 1327. De Camp v. Thomson, 385.
§ 1344. Curtin v. Metropolitan Street R. Co., 586.
§ 1670. Brandow v. Vroman, 370.
§ 1743. Wendel v. Wendel, 152.
§ 2224. Matter of Hattersley v. Cronyn, 259.
§ 2256. Bien v. Bixby, 127.
§ 2435. Eleventh Ward Bank v. Heather, 87.
§ 2537. Matter of Te Culver, 217.
§ 2722. Matter of Warner v. Bartle, 488.
§§ 2742, 2743. Matter of Whitbeck, 494.
§ 2942. Rosen v. Rosenthal, 143.
§ 2956. Wetterer v. Soubirous, 739.
§ 2993. People ex rel. McLane v. Whitney, 224.
§ 3235. Taylor v. Wright, 368.
§ 3268, subd. 4. Lintner v. Long Island Mutual Fire Ins. Corp., 305.
§ 3271. Kamermann v. Eisner & Mendelson Co., 554.
§ 3297. Schierloh v. Schierloh, 637.
§ 3307, subd. 7. Schierloh v. Schierloh, 637.
§ 3343, subd. 2. Matter of Blumenthal, 704.

CODE OF CRIMINAL PROCEDURE.

§ 721. People ex rel. Hunt v. Markell, 607.

COMMISSIONER OF DEEDS.

See **New York City.**

COMPLAINT.

See **Conversion.**
Pleading.

COMPROMISE.

Offer and acceptance — Arbitration as a condition precedent.— Where, upon a settlement of a claim against the property of his wife, a husband offers to pay a certain sum and the claimant accepts it, reserving, however, the claim of a third person which is stated to be "subject to arbitration," the claimant cannot recover the item of the husband where no arbitration has been had, nor can he recover at all where the facts tend to show that the arbitration, in view, was to be had, not between the husband and the claimant but between the claimant and the person who had furnished the goods to the house. Perry v. Erb, 6.

See Assignment for Benefit of Creditors.

CONSTITUTIONAL LAW.

1. Constitutionality of chapter 392, Laws 1897, relative to vacating a cancellation of tax sale.—Chapter 392 of the Laws of 1897, amending the Tax Law (Laws of 1896, chap. 908, art. 6, § 141), and authorizing the comptroller to set aside any cancellation of sale made by him or by any of his predecessors in office, is constitutional, as the office of comptroller is a continuing one, and the new incumbent merely takes up its business at the point where his predecessor left it. Weed v. Roberts, 46.

2. Injunction denied — Remedy at law — Injury not irreparable.— A temporary injunction will not be granted, in an action brought to restrain the comptroller from granting an application presented to him to vacate a cancellation of sale, made by one of his predecessors in office, where the acts of the comptroller are not final, but may, if erroneous, be reviewed by a writ of certiorari, nor where the plaintiffs have an adequate remedy at law, nor where it does not appear affirmatively that positive injury to the plaintiffs will follow if the injunction is refused. Id.

3. Subject not mentioned in the title of an act.— Chapter 361 of the Laws of 1863, relative to the corporation of the Union Railway Company of New York city, is not rendered unconstitutional by the fact that a single section, which is independent of all others and which provides for the extension of the road, contains a subject which is not mentioned in the title of the act. Bohmer v. Haffen, 565.

4. Consolidation of railroads — Creation of a new railroad and by a new name.— An act (Laws 1892, chap. 340) is not rendered unconstitutional because it authorizes the consolidation of two or more railroads nor because it dissolves the original corporation and creates a new one with a new name. Id.

5. Waiver of forfeitures, in failing to complete a railroad in time. — The state may, by subsequent legislation, waive forfeitures, which would otherwise have resulted from the failure of a railroad corporation to complete its road within the time fixed by law. Id.

CONTEMPT.

1. Failure to obey order to deliver property to receiver.— The failure of a judgment debtor to deliver in accordance with an order of the City Court of the city of New York, a certain ring to a receiver of his property, appointed in supplementary proceedings, and his delivery, instead thereof, of another ring of little value, constitutes him guilty of a civil contempt (Code of Civil Procedure, § 14, subd. 3; § 3343, subd. 2) punishable by a fine and the costs of the motion. Matter of Blumenthal, 704.

2. Form of order of punishment. — The fact that the defendant has, by its terms, been given an opportunity to comply with the order before a commitment shall issue, does not affect the validity of the order. Id.

CONTRACT.

1. Consideration.—A sufficient consideration for an executed agreement, made by the driver of an express wagon, that his employers might deduct from his wages the value of a package which he negligently lost from their wagon, and for which they were

obliged to pay the consignor, exists in the fact that the deduction was agreed to be made in installments, at periods convenient to the driver, and in the further fact that, had he refused to make good the loss, he might have lost his employment. Martin v. Guindon, 141.

2. Dependent on the satisfaction of a pupil—Capricious dissatisfaction.— Where a person, maintaining a school for instruction in the millinery art, specially contracts with a pupil that, if she is not satisfied with the teaching, materials and in every respect, he will refund the fee which she pays, he constitutes the pupil the sole arbiter of her own satisfaction and must return the fee if she is not satisfied in every respect; and, if it be assumed that the dissatisfaction must not be merely capricious, the finding of a justice of a District Court of the city of New York in favor of the pupil, resolves that question in favor of the assignee of the cause of action of the pupil. Dermody v. Flesher, 348.

3. Exclusive license to use a patent — Construction.—An agreement by the terms of which licensees, in consideration of the exclusive use for one year of a patent, expressly promise the patentees to sell not less than a certain number of buttons within the year and also pay a royalty on each button sold and which subsequently provides that, if the licensees do not sell the prescribed number, they shall lose their option of renewing the contract or of buying the patent itself at the end of the year, entitles the patentees to the absolute payment of royalties on the minimum number fixed, irrespective of the number sold; and the contention that the only effect of failing to sell the minimum number was to forfeit the option, renew the contract or buy the patent, is not tenable. Meyer v. Brenzinger, 712.

4. Action on — General denial — Parol evidence that the contract was not made.— Where the complaint, in an action upon a contract of conditional sale, alleges that the defendant executed a written contract annexed to the complaint, partly written and partly printed, and containing a provision for the payment of a part of the purchase price in notes, and the answer, besides denying these allegations, alleges that it was agreed that no notes should be given and also states that the defendant signed in blank, a printed paper similar to the contract set forth, in reliance upon the understanding that no notes were to be given, the defendant may show by parol that the provision as to the notes was not in the contract when he signed it; and the admission of such evidence does not violate the rule excluding parol evidence which tends to contradict or vary the terms of a written instrument. National Cash Register Co. v. Riggs, 716.

5. Obligation — Permitting a fire alarm to remain in a theatre.— The mere fact that the lessees of a theatre permitted fire-alarm boxes, placed therein at the instance of a former tenant, to remain upon the premises, does not impose upon them any liability for the use of the boxes, where there is no proof that the lessees ever requested that they should continue to be maintained. Manhattan Fire Alarm Co. v. Weber, 729.

6. A legal duty performed by another.— Proof that a statute, applicable to a city (Laws of 1882, chap. 410, § 454, as amended by Laws of 1892, chap. 703 § 1), requires theatre proprietors to provide such alarms as board of city commissioners may direct, does not enable a company, furnishing a particular alarm not shown to have been adopted by such commissioners, to recover of the theatre proprietors for its use, under the contention that the corporation has, in the public interest, discharged an obligation which the law imposed upon the theatre proprietors, as the statute itself affords ample authority to the city officials to enforce the law. Id.

See **Corporations.**
Sale.
Specific Performance.

CONVERSION.

1. Money received in a fiduciary capacity — Check — Order of arrest.— Proof that, after a vendee had failed to pay a note which he had given for goods sold, he gave the vendor his check for the express pur-

pose of taking up the note, and that, although the check was paid, the vendor never took up the note, and that the vendee was compelled, by action, to pay it to the holder, establishes a conversion and justifies the issue, against the vendor, of an order of arrest as for a "fraudulent conversion of money received in a fiduciary capacity." Wandelt v. Burnett, 315.

2. **Complaint.**— A complaint, which alleges that the vendor and defendant fraudulently misapplied and converted the proceeds of the check to his own use, and that he falsely and fraudulently represented to the vendee and plaintiff that he had, with the proceeds of the check, taken up the note and that the same was paid, sufficiently avers a conversion. Id.

3. **Lawful possession of the defendants under a bill of sale.**— Proof, made in an action of conversion, that on the day before the plaintiff delivered goods, sold absolutely to a customer, the latter, in consideration of a prior indebtedness to the defendants, executed to them a bill of sale of all his stock, including the goods in question, not accompanied by proof of any subsequent act of rescission upon the part of the customer, is insufficient to support the action, as the possession of the defendants has been lawfully acquired. Feist v. Prince, 358.

See **Bailment.**
Chattel Mortgage.
Fixtures.

CORPORATIONS.

1. **Liability of trustees under section 7, chapter 319, Laws 1848 — Judgment in action against corporation.**—Where an action is brought against trustees of a hospital incorporated under chapter 319 of the Laws of 1848, to enforce their liability under section 7 of said act, for a debt of the corporation, a judgment-roll filed in a former action brought by the plaintiff against the corporation is inadmissible to prove the existence of the debt as against the trustees, and the burden is upon the plaintiff to show affirmatively and independently that the trustees authorized the contraction of the debt for which the former judgment was recovered. Wetter v. Lewis, 12.

2. **A stockholder is not personally liable to the attorney of a corporation.**— An attorney-at-law employed, but not exclusively, by a corporation, at a salary of $50 per week, and not having his office in any building nor upon any property belonging to the corporation, cannot maintain an action, under the provisions of the Stock Corporation Law (Laws of 1892, chap. 688, § 54), making the stockholders of every stock corporation "personally liable for all debts due and owing to any of its laborers, servants or employees other than contractors, for services performed by them for such corporation," as he is neither a laborer, servant, nor employee, within the meaning of the statute, while the word "contractors," as used in the statute, refers merely to persons who perform work and furnish materials. Bristor v. Kretz, 55.

3. **Action by stockholder for torts of its directors — Corporation a necessary party — Request that directors sue.**—Where the complaint, in an action brought by and in behalf of a stockholder and of all other stockholders and creditors of a business corporation, alleges that the defendants, the directors of the corporation, at a time when it was insolvent, wrongfully and fraudulently transferred its property to themselves or to preferred creditors, and demands, besides damages, an accounting, the action must be deemed equitable in its nature, and cannot be maintained where the corporation is not made a party, and where the refusal, upon request, of the directors to bring the action is not alleged. Corning v. Barrett, 241.

4. **A complaint showing no damages at law.**— Assuming that the action is intended as one at law to recover damages, an allegation that the directors, at a time when the corporation was insolvent, transferred its property to themselves or others, does not show that the plaintiff, a stockholder, was damaged thereby. Id.

5. **By-law fixing the salary of president — Modification — Consideration — Acquiescence.**— A by-law

of a corporation, fixing the salary of its president, may be validly modified by an executed parol agreement, made between and acquiesced in by the parties, by the terms of which the president accepted a lower salary in consideration of being continued in office and employment; the modification being made necessary by the necessities of the corporation. Bowler v. American Box Strap Co., 335.

6. **Power of agents to contract.**— Where the by-laws of a corporation authorize its officers alone to make contracts for it, one of its agents has no power to bind it by a direction to a customer, for whom the corporation had nearly finished an electric switchboard to light his theatre, work upon which had been stopped at the instance of labor unions, that he might have the switchboard installed, at the expense of the corporation, by another company. Miner v. Edison Electric Illuminating Company, 543.

7. **Preferential judgments—Stock Corporation Law.**— Proof that the president of an insolvent corporation, which was indebted to his cousin, consented that the debt be divided into several notes, each of which was within the jurisdiction of the City Court of the city of New York, to the end that a foreign assignee of the cousin might obtain upon the notes summonses in that court returnable in two days, and that, after the summonses had been served upon the corporation, the president concealed the fact and refrained from putting the corporation into the hands of a receiver until after judgments had been obtained upon the notes and levies had been made under executions, renders the judgments void under the Stock Corporation Law (Laws of 1892, chap. 688, § 48), prohibiting an insolvent corporation from making transfers with a preferential intent. Rossman v. Seaver, 661.

8. **A receiver is not bound to complete its contracts — Rights of special and general creditors.**— The receiver of an insolvent corporation is not bound to complete its contracts, but if he does so, without objection from any party in interest, the cost of completion is properly chargeable to special creditors who have an assignment of, or a lien upon, the proceeds of the contract; and the cost, together with a proportionate share of the expenses of the trust, should be deducted from the proceeds before the balance is paid over by him, instead of deducting it from the general funds of the trust. The cost of the completion of the contract would, in any event, be the measure of damages for the nonperformance by the corporation of its contract and the special creditors can prove that cost as a claim against the general fund and share pro rata with other creditors. Matter of A. E. Chasmar & Co., 680.

9. **Failure to keep a stock-book — Refusal to show it.**—Where a foreign corporation, having an office but no transfer agent in this state, has failed to comply with the provisions of the Stock Corporation Law (Laws of 1890, chap. 564, § 53, as amended by Laws of 1897, chap. 384), requiring it to keep in its office a stock-book for the inspection of stockholders, a person, in the office but not shown by a preponderance of proof to have been an officer of the corporation, cannot be made liable, for the statutory penalty imposed upon a refusal to show the stock-book, by proof that he answered a demand for it by saying to the stockholder that the book was not in the office, that it could not be shown and that the only book of that character was in the foreign state. Greene v. Shain, 720.

See **Assignment for Benefit of Creditors.**
Clubs.
Will.

COSTS.

1. **Trespass — Plea of title in Justice's Court — New trial in Supreme Court.**—Where an action for trespass, begun in Justice's Court, is there discontinued upon a plea of title, and the complaint, in a subsequent action for the same trespass brought in the Supreme Court, is dismissed because the evidence showed the plaintiff to be out of possession, a defendant, who has failed to procure a certificate that the title to real property came in question on the trial in the Supreme Court, cannot, on a motion to enter judgment, be heard

to insist that, within the meaning of the Code of Civil Procedure, section 3235, there has been no "trial of an issue of fact" and that he is entitled to costs as of course, as the statute itself fixes the costs; and the question, whether there has been a trial of an issue of fact, can properly be considered only upon the taxation or, by the court, upon a retaxation of the costs. Taylor v. Wright, 368.

2. Extra allowance.—Where the answer in an action for goods sold put in issue the sale and delivery of more than 300 items and plaintiff recovers, before a referee, a judgment of $20,000, and it further appears that the deliveries were made, as directed by the defendants, to various customers of theirs at different times and in different places, the action must be deemed difficult and extraordinary, within the Code of Civil Procedure, section 3253, and an allowance of $500 is proper. National Lead Co. v. Dauchy, 372.

See **Appeal.**
Security for Costs.

COUNTERCLAIM.

Return commissions of consignees — Trade custom.— Where a general custom exists in a trade that, where a consignor takes goods away from a consignee before a sale has been made, the consignee shall receive an equitable allowance to cover the expenses of handling, insuring and storing the goods while they were in his charge, this allowance being denominated "return commissions," consignees, not in default, may interpose, to an action brought by a consignor for a balance alleged to be due upon goods consigned and not accounted for, a counterclaim for reasonable "return commissions." Botany Worsted Works v. Wendt, 156.

COUNTY.

1. Property destroyed by mobs or riots — Proofs under section 21, chapter 685, Laws 1892 — Statute of Limitations.— Persons who seek to recover, under Laws of 1892, chapter 685, section 21, of a county damages for property destroyed by a mob or riot, must prove compliance with all the statutory requirements; and where they fail to prove that they notified the "sheriff of the county of a threat or attempt to destroy or injure their property by a mob or riot, immediately upon acquiring such knowledge," or in the alternative, that they did not have such knowledge until the property in question was injured, and where they do not bring their action within three months, as required by the statute, it cannot be maintained. Salisbury v. County of Washington, 41.

2. Expenses for experts on a trial for murder — County charge. — Expenses, necessarily incurred by a district attorney under agreements made by him with medical witnesses sworn upon the trial for murder of a person belonging to an influential family, are a proper county charge under the County Law (Laws of 1892, chap. 686, § 230, subd. 2). People ex rel. Tripp v. Board of Supervisors of Cayuga County, 616.

3. Audit by supervisors — Demand — Mandamus.— Where the bills of such claimants are, after presentation to the board of supervisors, withdrawn from their consideration, the board has no power thereafter arbitrarily to audit the bills at amounts less than their face; but where the claimants, after their withdrawal of the bills, have made no subsequent demand for their audit, they are not entitled to a peremptory writ of mandamus requiring the board to convene and make the audit. Id.

CRIMINAL LAW.

1. Denial of a trial by a legally constituted jury.—Where a person, charged with an assault in the third degree, demands, upon arraignment, a jury trial, and the magistrate, instead of delivering the venire to a constable, as required by the Code of Civil Procedure, section 2993, delivers it to a deputy sheriff, having by statute no authority in the premises, and the accused subsequently objects to the authority of the justice to draw and impanel the jury, to his jurisdiction, and to all the proceedings had before trial, the subsequent conviction of the

accused is illegal, as he has been deprived of his right to a trial by a legally constituted and constitutional jury. People ex rel. McLane v. Whitney, 224.

2. **Certificate of conviction.**—A certificate of conviction which, among other things, states the commission of the offense, its date, and its nature, by the statement that the accused was, before the city recorder, "charged with petit larceny" in said city, is sufficient, under the Code of Criminal Procedure, section 721, although it fails to state the property taken or the person from whom it was taken. People ex rel. Hunt v. Markell, 607.

See **Habeas Corpus.**

DAMAGES.

See **Assault.**
Eminent Domain.
Highways.
Libel.
Master and Servant.
Negligence.

DECEDENTS' ESTATES.

Statute of Limitations.— A special proceeding taken, under the Code of Civil Procedure, section 2722, to procure the payment of a claim against the estate of a decedent, based upon a judgment recovered against him in Justice's Court, in 1877, docketed in the proper county clerk's office in 1880, and, by a transcript, in 1890, in the county where the proceeding was begun after his death intestate, in 1897, is barred by the Code of Civil Procedure, section 382, subdivision 7, providing that an "action" upon a judgment or decree rendered in a court not of record must be brought within six years, as the word "action" includes a special proceeding. Code Civ. Pro., § 414. Matter of Warner v. Bartle, 488.

See **Executors and Administrators.**

DEEDS.

See **Easements.**

DEFAULT.

See **Bail.**
District Courts.
Judgment.

DEMURRER.

See **Pleading.**

DISMISSAL OF COMPLAINT.

See **Trial.**

DISTRICT COURTS.

1. **Answer — Insufficient denial.** — Where the plaintiff serves a verified written complaint, in an action on contract brought in a District Court of the city of New York, the defendant must serve a verified answer; and where such an answer, interposed to one of the causes of action, merely states that the defendant, by his attorneys, "alleges and respectfully shows" that certain allegations of the complaint "are denied," it is ineffectual for any purpose, and the plaintiff is, in the absence of any amendment being allowed upon the trial, entitled to judgment upon that cause of action. The plaintiff is not bound in such a case to move to make the answer more definite and certain. Feder v. Samson, 111.

2. **Demand of an account, on joining issue — Record should show that the account was ordered to be exhibited or stated.**— Proper practice, under section 2942 of the Code of Civil Procedure, made applicable to District Courts in the city of New York (Laws of 1882, chap. 410, § 1347), and giving the court power, upon the request of either party, at the joining of issue, to require the adverse party "to exhibit his account or demand or to state the nature thereof, as far as it is in his power so to do, at that or another specified time," and providing that, in case of default, the party may be precluded from giving evidence of parts not exhibited nor stated, requires some formal determination and direction by the court in the matter, the terms of which should be entered upon the rec-

ord; and where the record, in an action for goods sold and delivered, shows no action by the court which requires the plaintiff to exhibit his account or to state its nature, an objection made, upon the part of the defendant, to evidence of the plaintiff as to the nature of the goods sold, based upon the statement of the defendant's counsel that, although he had demanded a bill of particulars, none had been furnished, cannot prevail upon an appeal. Rosen v. Rosenthal, 143.

3. Power to open default after failure to set aside service of the summons — Terms.—Under the Consolidation Act (Laws 1882, chap. 410, § 1367, as amended by Laws of 1896, chap. 748), a justice of a District Court of the city of New York has power, after the reversal of an order vacating a judgment for an alleged failure to serve the defendant with the summons, to open the default and allow him to plead; but where it appears that his motion to vacate the judgment subjected the plaintiff to costs which have been taxed and entered, the payment of these costs should be made a condition of opening the default. Szerlip v. Baier, 351.

4. Fees of experts are not taxable.—The fees of witnesses, upon a trial had in a District Court of New York city, are fixed exclusively by the Consolidation Act (Laws of 1882, chap. 410, § 1370) and, as the statute allows nothing for the services of experts, they cannot be taxed as disbursements. Randall v. Morning Journal Association, 715.

5. Amendment of pleadings. A justice of a District Court of the city of New York has power, at any time before or during a trial, to amend the pleadings, if substantial justice will be promoted thereby. National Cash Register Co. v. Riggs, 716.

See **Appeal.**
New Trial.

DIVORCE.

A divorced mother permitted access to her infant child. – Where a child, aged three years, is intentionally kept by its father and custodian from all knowledge of, or intercourse with, its mother who has been divorced for her adultery, the court will, where the judgment in the action for divorce provides for such an application, permit the mother to see the child four times a year, in the presence of a referee, if that course is deemed necessary by the parties. McGown v. McGown, 307.

See **Marriage.**

DOWER.

Fees of referee — Sheriff's fees.—The fees of the sheriff of the city and county of New York, upon a sale of real property made under an execution, are controlled by a special statute (Laws of 1890, chap. 523, § 17, subd. 7, as amended by Laws of 1892, chap. 418), and not by subdivision 7 of section 3307 of the Code of Civil Procedure; and as a referee in an action for dower brought in the county of New York is, subject to the limitation of $500, entitled to the fees of the sheriff (Code of Civil Procedure, § 3297), he must be allowed similar fees and disbursements up to the limit of $500. Schierloh v. Schierloh, 637.

See **Will.**

EASEMENTS.

1. Exception, accompanied by a reservation of a right of way in favor of the grantors.—A grant by executors, having a power of sale, of certain lands "Saving and excepting therefrom fifteen feet by fifteen feet on the northeasterly corner of said lot, reserved as a way to Reade's (their testator's) cellar," under his store upon the adjoining lot, absolutely excepts from conveyance the plot described and reserves no easements over it in favor of the grantee; and where it further appears that a subsequent mesne grantee, under the executors, of the store and plot, has, under a claim of right, by himself and by his grantors, long used the plot as a way to a cellar and has also built a shed upon it, he cannot be restrained by the owner of the lot first granted from building more substantially upon it, as the latter owner has no ease-

ments of light, air, or of any nature in regard to it. Mount v. Hambley, 454.

2. Action to restrain the obstruction of an alley — Legal title.— An action may be maintained to enjoin the defendant from obstructing an alley and to compel him to remove existing obstructions, although the plaintiff has not first established his title at law, and particularly in a case where the objection has not been raised by answer. Lambert v. Huber, 462.

3. Adverse possession.—Adverse possession of parts of an alley is established by the maintenance by an abutting owner and her grantees, during a period of thirty years, of buildings encroaching upon the alley. Id.

4. Replotting — Easements on a new alley shown.—Where lands, facing on an alley running east and west, are subsequently and, about 1836, replotted by their owners so that instead of running north and south they run east and west, face on a street and have an alley in their rear and are thus shown on an official city map of 1845, and upon subsequent maps, the latter alley must be deemed to have been laid out for the use of the lots as replotted and a deed of the lots, having reference to the plan by which they were replotted, conveys an easement in the alley. Id.

ELECTIONS.

A recount of ballots, cast at a town meeting upon the question of selling liquor, may be compelled — Insufficient alternative writ of mandamus — Effect of petition and affidavits.— The court has power, under the Election Law (Laws of 1896, chap. 909, §§ 111, 113, 114), to require, by mandamus, a recount of ballots rejected at an election, had at a town meeting, where there was a special vote under the Liquor Tax Law (Laws of 1896, chap. 112, § 11, subds. 1, 16) to determine whether liquor should be sold in the town; but where an alternative writ, issued ex parte, contains no allegations as to whether a proper legal return was made, or whether, if made, it contains a statement that the ballots sought to be counted were declared void, or whether the ballots in question were, in fact, declared void and were so indorsed, or whether the inspectors failed to count any protested ballots, the writ is insufficient to justify the issue of a peremptory writ; nor can resort be had to the petition or affidavits in order to sustain it. People ex rel. Decker v. Parmelee, 380.

EMINENT DOMAIN.

Condemnation of the fee of a street — Private easements — Measure of damages.—Where the owners of land abutting upon a street, shown on the city map of New York, authorized by chapter 115 of the Laws of 1807, and subsequently projected easterly to the exterior street, adopted by the city common council in 1859, have, by their conveyances, among each other so dealt with the fee in the street that, while retaining title to it, they have reciprocally created private easements in it, they become, in the absence of the requisite clear proof of a dedication of the fee in the street to the public use, entitled, upon an absolute condemnation of it by the city, to damages which, while necessarily more than nominal, cannot be the full value, but only such value as it has subject to the existing private easements. Matter of Ninety-fourth Street, 32.

See **Municipal Corporations.**

ESTOPPEL.

See **Assignment for Benefit of Creditors.**
Foreclosure.
Negotiable Instruments.
Undertaking.
Will.

EVICTION.

Ordinary inconveniences will not justify a tenant in abandoning.— Ordinary inconveniences suffered by a tenant arising from the facts that gas in the main hall of an apartment-house was not lighted as early as it should have been; that at times the front door bell was not answered; that three times within two weeks a pump

broke down and on one occasion cut off the water supply for an hour and one-half; that the back stairs were frequently not lighted; that an important package from a druggist was not delivered; that on several occasions the milkman was compelled to leave milk outside the premises and that coal was sent up by a dumb-waiter at inconvenient times, do not constitute an eviction which justifies the tenant in abandoning the premises, nor does it relieve him from the payment of the rent. Humes v. Gardner, 333.

See **Summary Proceedings.**

EVIDENCE.

1. Parol, to show that a bill of sale did not include the thing stored.—The rule that parol evidence is inadmissible to contradict or vary a written contract applies only to controversies between the immediate parties to the instrument, and does not preclude a bailee from showing, as against the bailor, that a bill of sale, by which he sold to a third party his business at the place of the bailment, "together with all the goods, chattels, stock in trade," etc., did not include the property which he held as bailee. Emerald & Phoenix Brewing Co. v. Leonard, 120.

2. Ambiguity.—Where the description of property, as contained in a written instrument, is ambiguous, parol evidence is admissible to ascertain the nature and quality of the subject-matter to which the instrument refers. Id.

3. Declarations in one's own favor.—The letters of a party are not admissible to support its version of a verbal agreement. Levison v. Seybold Machine Co., 327.

4. Code of Civil Procedure, section 829, does not apply to transactions with deceased officers of corporations.—A corporation cannot invoke section 829, Code of Civil Procedure, in order to exclude testimony of a conversation had by a party with its managing director, as that section has no application to personal transactions with deceased officers or agents of a corporation. Flaherty v. Herring-Hall-Marvin Safe Co., 329.

5. Admissions of an agent, in custody upon a criminal charge — Proof.—Admissions made by an agent, although in the custody of a detective officer on a charge of misappropriating the proceeds of sales of his principal's goods, when not induced by threats, promises or deception, are competent against the agent and may be proved by the testimony of the officer to whom they were made.—Notara v. De Kamalaris, 337.

6. Proof, a claim by a certificate in an action for an attachment.—Where an action is brought by an assignee of a claim, the court may, upon the disputed question of the amount due, consider a certificate, furnished in an action for an attachment, to the sheriff by the defendant, in which it denied any indebtedness to the attachment creditor and alleged that the exact amount, for which the plaintiff now claims, was due by it to a person named and who subsequently became the assignor of the plaintiff's estate. Clokey v. International Rubber Clothing & General Supply Co., 518.

7. Objection to a paper.—An objection, made to the admission of a telegram as incompetent, does not sufficiently raise the objections that the original was not produced, and that no proof had been made that the telegram had been transmitted to the party sought to be charged. Morris v. Murray, 697.

See **Appeal.**
Contract.
Corporations.
Negligence.
Negotiable Instruments.
New Trial.
Partnership.
Railroads.
Replevin.
Sale.
Verdict.
Witness.

EXCISE.

See **Liquor Tax Law.**

EXECUTORS AND ADMINISTRATORS.

1. Funeral expenses are a charge against the estate of a decedent —

Form of action.— The necessary and suitable expenses and services, attendant upon the burial of a decedent, ordered by his widow, are, in the absence of proof that they were incurred and rendered upon her own credit, a charge against the estate of the decedent alone; and an action for their recovery is properly brought against the executrix in her representative capacity. Riley v. Waller, 63.

2. Payment to a surrogate of a sum found due to the next of kin — Liability of the administrators to repay the next of kin, upon the default of the surrogate — Payment into court.— Proof that administrators, before the entry of a decree judicially settling their accounts, paid the amount found due in the proceeding by them, and distributable to the next of kin, to the surrogate by a check, that he receipted for it to them as paid him for the next of kin, and that the check was subsequently paid, does not protect the administrators, no decree having ever been entered, from the repayment of the amount to the next of kin, where the surrogate subsequently fails to account for it, as such a payment to him cannot, within the provisions of the Code of Civil Procedure, section 2537, be deemed a legal payment into court of the fund. Matter of Te Culver, 217.

3. Accounting for distribution — Former accounting under Code Civil Procedure, section 2742, not a bar to a claim — Equitable assignment.— Upon an accounting for distribution, under Code of Civil Procedure, section 2743, it appeared that the will of a testator declared an equitable conversion of all his real into personal property except as to certain real estate devised to his wife for life, which was subsequently to be sold and divided, and gave each of his six children an equal share in all his property. In 1873 one of two acting executors loaned a part of the share of a minor to her brother, who gave her a note therefor and also an order on the executor for its payment from his share. In 1885 the surviving executor procured a judicial settlement of his account, under Code of Civil Procedure, section 2742, to which the minor, then of age, was made a party, but did not appear personally, nor present her note and order, or advise her counsel that she had them. The decree entered, after reciting that the executors had made certain other subsequent advances to the brother of the minor upon pledges of his interest in the estate, charged them upon his share and authorized the surviving executor to retain a sufficient amount of it to pay, or if it was insufficient, to pay, in their order, the other subsequent advances which had been made. Held, that the advance made by the executor himself from the moneys of the minor was prior in time, was secured by the order, which amounted to an equitable assignment pro tanto of the share of the brother and was entitled to a preference; and that the decree of 1885, made when, as it appeared, there were no moneys to distribute and when others distributable had not been realized, was not a bar to the allowance of the claim of the minor in the proceeding for distribution, taken after the death, in 1894, of the widow, the time when a final distribution could first be made. Matter of Whitbeck, 494.

See **Easements.**
Powers.

FEES.

See **Dower.**

FIXTURES.

Landlord and tenant — Conversion.— Such articles as a glass cabinet partition, brass chandeliers and a showcase placed in a store by a tenant, are fixtures which may be bought and sold by his successors, and one who buys them from the last tenant of the store, ejected by summary proceedings, may maintain an action for conversion against the landlord upon his locking up the premises and preventing the purchaser of the fixtures from removing them. Smusch v. Kohn, 344.

FORECLOSURE.

1. Equities as between assignees — Bona fide purchasers.— Where the legal owner of premises, subject to two mortgages, authorizes an attorney to raise money for their payment and the owner thereafter gives a lender,

for that purpose, a purchase-money mortgage and the attorney pays the existing mortgages, but, instead of having them satisfied, takes assignments of them to himself which he temporarily withholds from record, his bona fide assignees for value and without notice, other than such as might be derived from the fact that the consideration named in the assignments to him was one dollar, are to be protected in equity against purchasers from him of the purchase-money mortgage, which, upon its payment by him, he had procured to be assigned to himself; and this although he had assured such purchasers that the purchase-money mortgage was a first lien and although the records, at the time of the purchase, did not show the fact to be otherwise. Gearon v. Kearney, 285.

2. Fraud of agent of legal owner. — It is to be considered, upon such a state of facts, that the legal owner of the property has, by his acts, enabled the attorney to gain the possession and apparent ownership of the first mortgages, and hence bona fide purchasers of them from him are to be protected, even though his purpose in procuring the assignments to be made to himself was fraudulent. Id.

3. Latent equities subsequently created — Estoppel.—The representations of the attorney, made to the purchasers of the purchase-money mortgage and stating that it was a first lien, do not estop his bona fide assignees, as bona fide purchasers of a valid security cannot be charged with latent equities which have been created after the inception of the instrument. Id.

4. Bona fide purchasers — Notice. — Assignees of mortgages are not put upon inquiry by a nominal consideration expressed in prior assignments of the mortgages, where inquiry would not have disclosed an alleged priority. Id.

5. Failure to serve summons within sixty days — Invalidity of lis pendens.—The failure of the plaintiff to serve the summons in an action relating to real property within sixty days after the filing of the lis pendens, as required by Code of Civil Procedure, section 1670, does not invalidate the service of the summons, if actually made thereafter, but merely nullifies the lis pendens on file. Brandow v. Vroman, 370.

6. Parties — Failure to serve a mortgagor whose property was in the hands of a receiver.— An order to publish the summons is required by Code of Civil Procedure, section 439, to be founded upon a verified complaint, but where the property of the mortgagor is in the hands of a receiver, who is a party to the action, the mortgagor is a proper but not a necessary party; and hence second mortgagees of the same premises cannot procure the vacation of an order to serve the mortgagor by publication upon proof that the complaint was not verified, as the defect cannot affect the title. Id.

7. Estoppel.— Where a mortgagee, in writing, promises the undisclosed agent of the equitable owner of lands and who is also liable to pay a part of the mortgage debt, to release from the mortgage an acre of land upon the payment of $500, a sum already due upon the mortgage, the mortgagee anticipating that buildings to be erected on the lands would benefit her other adjacent vacant property, and the equitable owner, after the payment of this sum, erects, in reliance upon the promise, valuable buildings upon an acre, which he selected himself, as the mortgagee made no selection, and the buildings erected benefit her adjacent vacant lands, she will be deemed to be estopped from selling the selected acre upon the foreclosure of her mortgage. Hazard v. Wilson, 397.

FORMER ADJUDICATION.

See **Bar.**

FRAUD.

See **Foreclosure.**
Marriage.
Negotiable Instruments.
Partnership.
Release.

FRAUDULENT CONVEYANCES.

1. Chattel mortgage.— A chattel mortgage with an attendant agreement, whether in the instrument or not, whether written or oral, and

whether express or tacit, that the mortgagor may remain in possession, with a power to sell in the usual course of trade, but without an obligation to apply the proceeds in payment of the mortgage, is, as matter of law, fraudulent and void against creditors of the mortgagor. Hardt v. Deutsch, 66.

2. Same.— Where, however, it appeared that shortly after, and on the same day on which chattel mortgages were executed and delivered, before knowledge of their existence could have transpired, while yet none of the property had been disposed of by the mortgagors, and no lien acquired or action brought by any creditor, a collateral agreement, or tacit understanding that the mortgagors should remain in possession of the mortgaged property and sell the same in the ordinary course of trade was annulled, and possession of the property surrendered by the mortgagors to the mortgagees, Held, that the mortgages were valid; that they were not, in legal effect, bills of sale and so transfers by insolvent debtors for an inadequate consideration; that a transfer by the mortgagors of the surplus of the mortgaged property and proceeds did not authorize a presumption of a secret trust to the use of the mortgagors; and that such mortgages did not constitute, or form part of, a fraudulent device to coerce creditors to a compromise. Id.

3. An instrument hindering creditors — Nonconsenting creditors.— A trust instrument, made by a judgment debtor when insolvent, by which he transfers all his business and assets to trustees who are to conduct the business for an indefinite time and pay in full, from the proceeds, such creditors as shall come in and agree to the arrangement, and thereupon transfer the business to the debtor, and which further provides that if the debtor at any time provides a purchaser of the business for a sum sufficient to pay the consenting creditors, the trustees shall transfer the property to the purchaser upon receiving that sum, which shall be divided among the consenting creditors, is a scheme which hinders and delays all creditors who do not consent to it and may be set aside at the instance of a nonconsenting judgment creditor. Wright v. Thorpe, 284.

4. Fraudulent transfers, including a friendly receivership — When the receivership will not be vacated.— A scheme, perfected by the assent of preferred creditors, under which a solvent firm, by means of various assignments to and judgments confessed in favor of such creditors, by the collusive appointment of a friendly receiver in an action brought between the partners and by other acts indicating fraud, is reduced in nine months to a condition where all the firm and individual assets are placed beyond the reach of an execution and where the sale of its entire assets, made at a properly managed receiver's sale, is insufficient to pay unpreferred creditors 40 per cent. of their claims, cannot be upheld and the transfers and confessions of judgment must be declared void as made with an intent to hinder, delay and defraud creditors; but where an additional and unobjectionable receiver has been appointed in the partnership action, creditors who have not levied executions before the appointment of the first receiver, cannot obtain the vacation of the receivership, and both receivers will be directed to take the entire partnership property and its proceeds, free from the fraudulent transfers and judgments, and divide it equitably among the creditors. Metcalf v. Moses, 664.

GUARDIANS.

For incompetent defendant — Appointment — Leave to sue — Code of Civil Procedure, section 428.— A guardian ad litem cannot be appointed ex parte, under the Code of Civil Procedure, § 428, for an incompetent defendant in an action, where no leave to sue has been first obtained, as that section authorizes such an appointment only after legal service of the summons upon him and upon his committee; and where no such leave has been obtained, the service of the summons is improper, and the appointment of the guardian ad litem and the service must be set aside. Smith v. Keteltas, 588.

GUARDIAN AD LITEM.

See **Guardians.**

GUARANTY.

See **Assignment.**

HABEAS CORPUS.

Certificate of conviction.—A sheriff cannot hold a prisoner, as shown by the return to a writ of habeas corpus, upon a "certificate of conviction" and upon "a judgment of conviction," where it appears that the certificate of conviction contains no commitment, nor any statement showing that the magistrate had jurisdiction of the offense; nor is the sheriff assisted by the mere invocation of the judgment of conviction, where the fact of the judgment is not established by him. People ex rel. Snyder v. Whitney, 226.

HIGHWAYS.

1. **Award.**—Where commissioners, appointed to lay out a highway, view the premises, under direction of section 81 of the Highway Law, their own judgment enters into the amount of the award made for damages and this will not be set aside as against the evidence. Matter of Pugh, 43.

2. **Defects in proceedings, when not available.**—The objection that a petition and notice, in such a proceeding, are insufficient, should be raised by a motion to set aside the order appointing the commissioners and should not be presented, in the first instance, after the merits have been litigated. Id.

3. **Rules of evidence.**—Proceedings, had before such commissioners, need not be governed by the technical rules of evidence which prevail in a court of record. Id.

4. **Valuation of owner, based on a future use.**—Commissioners are not bound to adopt a valuation which an owner puts upon his property, he having in view a special use to which he means to apply his property at some future time. Id.

5. **Action to cancel a new survey — Survey of a highway long abandoned — Rights of bona fide purchaser — Parties.**— Proof, made in an equitable action brought to cancel an order and survey made, in 1895, by the highway commissioner of a town, ascertaining and describing a highway with respect to lands alleged to have been used as such for more than twenty years, tending to show that there is no record of the former laying out of such a highway; that although once used as such, it was discontinued in 1839 by the town authorities as useless; that thereafter it was a cul de sac entirely on the lands of the plaintiff; that it was grass-grown, uninclosed, and to some extent barred by posts twelve feet apart, and that it was in this condition when the plaintiff's mesne grantor purchased it for value in 1877, entitles the plaintiff, as a similar purchaser, in 1882, to the relief demanded; and her action is properly brought against the highway commissioner, as, in view of the decision that the lands belong to the plaintiff, the statute (Laws of 1890, chap. 569, § 182), providing that any action to enforce the liability of a town for any act or omission of its officers shall be brought in its name has no application. Riley v. Brodie, 374.

6. **Public highway laid out to benefit an individual.**— Where the main object of a proceeding, taken ostensibly to lay out a public highway, is to furnish access to the lot of an individual, not reached at present by any highway and which is the terminus of the one proposed, the report of the commissioners should be set aside and the individual be remitted to her right to apply for a private road, under sections 106 et seq. of the Highway Law. Matter of Lawton, 426.

HUSBAND AND WIFE.

1. **Abandonment — Husband's subsequent liability for necessaries.**— Utter indifference and neglect upon the part of a husband, not accompanied by proof of physical violence, threats or specific misconduct of any kind towards his wife, do not justify her in abandoning him, nor render him liable to third persons who thereafter supply her with necessaries. Bostwick v. Brower, 709.

2. **Agency of wife.**— No presumption of a continuing agency upon the

part of a wife, to procure necessaries on her husband's credit, can assist a claim for such necessaries, furnished after his abandonment and without knowledge of the same, where the vendor had never rendered to the husband any bills for necessaries purchased by the wife nor received payment for any such bills from him personally. Id.

INDEMNITY.

1. Inconsistent parol agreement that an indemnitor shall not be liable — An attorney as an indemnitor.— An indemnitor of a corporation, which, upon the faith of an agreement of indemnity, became surety upon an undertaking given upon appeal from a judgment, cannot, in an action subsequently brought upon the agreement, be permitted to show by parol an alleged contemporaneous agreement, by the terms of which his execution of the indemnity agreement was to be purely formal, while the corporation was to look for actual indemnity solely to a coindemnitor; nor does the fact that the indemnitor was an attorney-at-law affect his liability. American Surety Company v. Crow, 573.

2. Extension of time.— An extension of time, given by the party indemnified, to a surety will not discharge a cosurety where he has not been in any manner prejudiced by the extension. Id.

3. Application of payments.— Application of payments in favor and against indemnitors. Id.

INFANTS.

See **Will.**

INSURANCE.

See **Agency.**

INSURANCE (FIRE).

1. Pleading performance — Certificate of magistrate.— In order to recover upon a policy of fire insurance, the plaintiff must plead and prove compliance with all those conditions of the policy which are, by its terms, precedent to a recovery, and this may properly be done by means of a general allegation that the plaintiff has "duly performed all the conditions upon her part;" but a condition that the insured, "if required," shall furnish the certificate of the disinterested magistrate or notary "living nearest the place of fire" that he has examined the matter and believes the loss an honest one is not a condition precedent. McManus v. Western Assurance Co., 269.

2. General denial.— A general denial puts in issue all the allegations of the complaint relative to a compliance with conditions precedent to a recovery. Id.

3. Affidavit to proofs of loss — Omission of venue — Waiver by new requirements.— Where an affidavit, made under a requirement of a policy insuring the holder of the policy and "any member of the household" that proofs of loss shall be "signed and sworn to" by the insured, contains no venue, it is fatally defective, but the defect is waived where the insurer, in its objections made to the proof of loss, notifies the insured that it will require, as a condition precedent to payment, that each member of the household who lost property shall verify that schedule which shows the property lost by the member, as such a demand sets up an unauthorized requirement and dispenses with compliance with the one stated in the policy. Id.

4. Arbitrator not disinterested — Abandonment of appraisal by lapse of time.— The insured is not bound to participate in an arbitration, provided for by the policy, where she claims that the arbitrator appointed by the insurer is, for reasons stated by the insured, not disinterested; and where, after such objection made, the insurer, although established in the same city, takes no action in the matter for twenty-one days, the questions whether the arbitrator was disinterested and whether the insurer should not, by lapse of a reasonable time, be deemed to have abandoned the arbitration, are properly submitted to the jury. Id.

5. Right of insured to sue as trustee for "members of the household." — *Semble*, that the insured under a policy, insuring other "members of the household," may properly sue alone for the whole loss, as she may be deemed a trustee for the others. Id.

6. Insurer cannot exact additional requirements.— An insurer cannot after a loss has occurred establish a new requirement, not contained in the policy, that the proofs of loss shall show the cost of articles totally destroyed. Id.

See **New Trial.**

INSURANCE (LIFE).

1. Equity will not relieve from a legal forfeiture — Complaint and demurrer.– A complaint which alleges, in substance, that three annual premiums had been paid upon two several policies of life insurance; that thereafter there was a default; that the plaintiff thereupon became by the terms of the policies entitled to paid-up policies of a certain amount, provided the policies were surrendered, duly receipted, within six months of the date of the default; that they were not so surrendered because of the financial trouble and mental distress both of the insured and of the plaintiff, the assignee of the policies, and demanding as relief the issuance of paid-up policies is demurrable, as equity will not relieve an insured person or his assignee from the consequences of a legal forfeiture. Stayner v. Equitable Life Assurance Society, 53.

2. Actions in this and a foreign state to recover on policies pledged in the foreign state — Pledge redeemed by foreign administrator — Priority in taking jurisdiction.— Where the insured under and assignee of two policies, issued by a foreign life insurance company, pledges them in the foreign state to the insurer as collateral security for loans made by it to him, and subsequently removes to and dies within this state, and the administrator of his estate, duly appointed in the foreign state, advances moneys, redeems the policies from the insurer, which has at all times since the loan been in possession of them, and receives from it the amount due upon one of them, he may hold this payment as against an administratrix of the insured, duly appointed in this state and who, at the time of the payment in question, had already claimed the proceeds of the policies, had not offered to redeem them, but had begun an action to recover the proceeds of both, of which action the insurer had no notice when the payment in question was made; nor can the domestic administratrix maintain so much of her action as affects the policy not yet paid by the insurer, as both policies are subject to a redemption which she has not offered to make, and are held and owned by the insurer in the foreign state, whose courts were the first to take jurisdiction of the estate of the insured. Steele v. Connecticut General Life Insurance Co., 249.

INTEREST.

See **Usury.**

JOINT ADVENTURE.

Action at law to vacate a share of a loss suffered — Prior accounting unnecessary.— The fact that three persons entered into a single joint-stock speculation, in which they were to share and bear profits and losses equally, does not make them partners in a strict sense; and, although there has been no accounting had between them, one, who has borne the whole loss, may maintain against the executor of a deceased associate, an action at law to recover one-third of the loss, and this, although the remaining associate has not been made a party to the action. Burleigh v. Bevin, 38.

JUDGMENT.

1. Opening of, where there is no cause of action — Excuse for default.— The court will not open a judgment, rendered in an action, dismissing the complaint upon a default, upon the ground that the judgment was taken against the plaintiff through his mistake, inadvertence,

surprise or excusable neglect (Code of Civil Procedure, § 724), where it is clear that the action cannot be maintained; nor will the court act where the excuse offered by the plaintiff is unsatisfactory. Jospe v. Lighte, 146.

2. Offer of — Retraction.—An offer of judgment, made in an action by the defendant, under section 738 of the Code of Civil Procedure, cannot be retracted upon the same day, as the statute gives the plaintiff ten days in which to consider the offer which, during that period, is irrevocable. Hackett v. Edwards, Merrill & Co., 659.

See **Corporations.**

JURISDICTION.

Of the Appellate Division over unfinished business of the Court of Common Pleas.—The Appellate Division has succeeded to the powers of the General Term of the Court of Common Pleas for the city and county of New York, and, consequently, the Appellate Term has no power to direct the entry of an order, affirming a judgment of a District Court of the city of New York upon the opinion of the General Term of the Court of Common Pleas, the entry of which order had inadvertently been neglected until after the consolidation of the courts by section 2 of article 6 of the Constitution of 1894. Garsia v. Burch, 745.

JURY.

Competency — Opinion.— A juror who has formed an opinion is competent to serve where he states that, notwithstanding his existing opinion, he can render a verdict in accordance with the evidence given. Griffin v. Barton, 228.

JUSTICE'S COURT.

See **Costs.**

LANDLORD AND TENANT.

1. Redemption by tenant under a lease having an unexpired term of five years — Allowances to landlord for fire proofing, change into a theatre, use of new furniture, insurance, legal expenses, custodians — Rent — Commissions.— Where it appears, in a proceeding taken by the receiver of the assignee of the lessee of property used as a concert hall, and belonging to the tenant, in order to redeem, under section 2256 of the Code of Civil Procedure, from a dispossession under a lease having an unexpired term of five years, that the landlord has, by the terms of the lease, a right to buy the building at a sum not exceeding $50,000, he should be allowed, as against the receiver, for an expense, incurred during the period of dispossession, in making the building fireproof, under the order of the city department of buildings and for modelling it into a theatre, where it appears that the change was provident, was made at a reasonable cost and that the tenant was credited with the rent; he may also be allowed for the rental value of reasonable refurnishing, where that was made necessary by the removal by the tenant, upon dispossession, of the fixtures in the concert hall; nor should the landlord be charged with a reduction of the rent, below that secured by the former lease, where the sum obtained from the new tenant was the reasonable value of the use of the theatre. The landlord should not be charged, as against the receiver, with rent for the period during which the alterations were made; he is entitled to recover the amount paid for insurance upon the fair value of the premises during the period of dispossession; that paid for legal expenses incurred in dispossessing the tenant and for the wages of a gasman, electrician and janitor, employed as custodians for the period during which the marshal was engaged in executing the warrant of dispossession; but he can be allowed no commissions upon the rent which he collected of the tenant of the theatre during the period of dispossession. Bien v. Bixby, 127.

2. Negligence — A child injured by the fall of a ceiling.— A landlord, who has not agreed to repair, is not liable in damages to the child of a tenant for injuries received from the fall of a ceiling which, after the term had begun, became cracked and sub-

sequently fell upon the child. Reissman v. Jacobowitz, 551.

See **Eviction.**
Fixtures.
Lease.
Summary Proceedings.

LEASE.

1. A tender fixes the expiration of an existing lease.— The day when a tender, under section 2256 of the Code of Civil Procedure, was made by the receiver, as tenant out of possession, fixes the time when an existing lease to a new tenant, who has entered during the period of dispossession, shall expire; and where the tender complies with the terms of the final order, the receiver is entitled to immediate possession. Bien v. Bixby, 127.

2. Covenant to repair after a fire — Construction — Surrender.—The true construction of a lease, providing that, if the premises are partially destroyed by fire they shall be repaired "as speedily as possible" by the landlord and that, if the damages are so extensive as to render the premises untenantable, the rent shall cease until they are put in complete repair, while, in case of a total destruction, the rent shall cease altogether, is that, in case of a partial destruction, whether or not it render the premises untenantable, the landlord shall begin and complete the repairs as speedily as possible; and where he delays necessary repairing for three months, after a fire which has only partially destroyed the premises, but has also rendered them untenantable, the tenant is relieved from further liability by a tender of the keys and an offer to surrender. Bacon v. Albany Perforated Wrapping Paper Co., 592.

See **Landlord and Tenant.**

LEGACY.

See **Will.**

LIBEL.

Of a tradesman — Compensatory and punitive damages.— The printing and circulation by a person of a circular relative to his brother, who was conducting near by a business similar to his own, stating, among other things, "that an unscrupulous grocer of the same name in the immediate vicinity or neighborhood advertises 'Davey's teas and coffees,' with a view to deceive the public, and may sell an inferior article," is libelous per se, and entitles the person libeled to compensatory and punitive damages. Davey v. Davey, 668.

LIQUOR TAX LAW.

1. Assignee of a certificate conniving at illegal acts of occupants of a saloon — Cancellation.—Where it appears, in proceedings taken to revoke a certificate issued under the Liquor Tax Law (Laws of 1896, chap. 112), that, almost immediately after the certificate was issued, its owners assigned it to another although continuing to conduct the business themselves, and that they thereafter persistently violated that provision of the law which forbids the existence, in a room where liquors are sold, of any inclosed box or stall which prevents a full view of the entire room, and that they also unlawfully employed, to sell and serve liquors, a person who, to their knowledge, had been convicted of a felony, the certificate must be canceled, notwithstanding the property rights therein of the assignee, as he must, by his conduct, be deemed to have assented to the unlawful acts of his assignors. Matter of Bradley, 301.

2. Payment, for a certificate, not recoverable — Population of a village not shown by the census.— Where it is conceded that the population of a village is at least 4,000, a holder of a liquor tax certificate, voluntarily paid for upon that basis, cannot, merely because the population of the village is not stated, separately from that of its town, in either the last state or United States census, subsequently recover of the county treasurer the difference between that rate and the rate fixed for a village whose population is under 1,200; and the fact that the state commissioner of excise has not caused any enumeration of the village to be made under the statute (Laws of 1896, chap. 112, § 11, subd. 4), is immaterial. Baker v. Bucklin, 560.

See **Elections.**

LIS PENDENS.

See **Foreclosure.**

LIVERY STABLE KEEPERS.

See **Services.**

LUNATICS.

1. Complaint by a state hospital to recover against a father for the board of his child, not a minor.— A complaint in an action, brought in the name of a state hospital under the provisions of chapter 460 of the Laws of 1897, which merely alleges that a person, not stated to be a minor, was legally committed in 1893, to an asylum, which, in 1895, was transferred to the state and became the hospital which brought the action, that the patient is without means, and that the defendant, who is his father, is the owner of valuable real estate and other property, and that at the rate fixed by the state commission in lunacy, for the care of the patient, an indebtedness has been contracted upon his part, and demanding judgment against the defendant for that amount, does not state a cause of action entitling the hospital to recover under any of the provisions of the Insanity Law (Laws 1896, chap. 545). Long Island State Hospital v. Stuart, 48.

2. Liability of a relative for the board of a patient.— *Semble*, that, before any relative can be legally charged with any liability for the board of a patient in a state institution, an order must be made establishing the remissness of the relative and directing the confinement of the patient at his charge and expense. Id.

3. Power of Supreme Court to open his default — Answer of committee.— The fact that a County Court has acquired jurisdiction of the person and property of a lunatic does not, in the absence of laches, oust the Supreme Court of jurisdiction and power to open his default, taken in an action against him authorized by the County Court to be brought in the Supreme Court, and to allow him, by his committee, to plead therein, after the manner of an infant, or in such manner as his committee may be advised to plead. Kent v. West, 403.

See **Guardians.**

MALICIOUS PROSECUTION.

Want of probable cause — Status of plaintiff's husband, whether servant or tenant.— Where the proof, in an action for malicious prosecution, tends to show that the assault for which the defendant caused the plaintiff's arrest consisted, as she alleges, in her resistance to his entrance upon premises of which she and her husband claimed to be his tenants, and the testimony upon that question shows that the defendant had deducted from the wages of the husband, who was also in his service, moneys for rent, and had, in two affidavits used in judicial proceedings, stated, in one case, that he had rented the premises to both husband and wife and, in the other case, that he had rented them to the husband, the question whether the husband was servant or tenant is properly left to the jury. Ofschlager v. Surbeck, 595.

MANDAMUS.

See **Elections.**
Office and Officer.

MARRIAGE.

1. Annulment of — False statement of a woman, that she was capable of bearing children.— Where a woman, interrogated by her husband before marriage upon the subject, states that she is physically and mentally capable of being a wife, while the fact is that, some years before, she had submitted to a surgical operation which made her thereafter incapable of conception or of having children, her suppression of the truth amounts to a fraud which justifies the court in annulling the marriage under the provisions of section 1743 of the Code of Civil Procedure. Wendel v. Wendel, 152.

2. Barrenness after marriage.— *Semble*, that a marriage should not be annulled merely because the wife is barren. Id.

MASTER AND SERVANT.

1. Offer of a new rate of compensation — Dismissal — Measure of damages.— Where a servant, working for wages and commissions, is notified by the master that he will thereafter receive another rate of compensation, and, having taken no action upon the offer, is discharged at the end of that week, he may recover compensation therefor upon the terms of the original employment. Flaherty v. Herring-Hall-Marvin Safe Co., 329.

2. Bar — Another action pending. — An action already brought to recover damages of a corporation for having prevented its servant from earning commissions, is not a bar to a second action brought by him against it for commissions earned. Id.

MECHANICS' LIENS.

See **Bonds.**
New York City.

MISTAKE.

See **Money Paid, etc.**
Receipt.

MONEY PAID, ETC.

Failure to prove short weight in ice sold.— Where a retail and wholesale dealers in ice transact business upon the basis of a weighmaster's card, issued by the wholesale dealers, showing the weight of the wagon of the retail dealer, which weight was deducted from the total weight of the load, the latter cannot recover, as for moneys paid under an alleged mistake, upon mere proof that, after three months' use and dealings, the wagon weighed thirty pounds more than the weighmaster's card showed when made out, as, if the plaintiff claims that the weight was wrong, he must prove that it was incorrect when originally taken, and stated on the card, by the weighmaster. Murphy v. Knickerbocker Ice Co., 360.

See **Negotiable Instruments.**

MORTGAGE.

1. Validity of mortgages, given by a life tenant, who had a right to use the principal of an estate.— A bequest, by which a testator leaves his entire estate to his wife "for the support of herself and my children while she lives and remains unmarried, and at her death to leave the residue to my (his) children as she deems proper," gives her, during her widowhood, a life estate with power to use the principal, and hence mortgages, given by her during that period, are a valid lien upon the real estate of the testator. Blauvelt v. Gallagher, 564.

2. Executed to evade a power of sale — Bona fide purchaser— A bona fide purchaser of a recorded mortgage who, before purchasing it, procured affidavits as to its validity and value from the mortgagor and from one of the executors of an estate against which it was chargeable, will be permitted to enforce it by foreclosure although it is based upon a title which resulted from a fraudulent device by which executors, having merely a power of sale, by means of a transfer to a friendly third party and a retransfer from him to an heir, procured the mortgage to be given by the latter to the end that the executor, who attested its valdity and value, might raise money upon it for his private uses. Rosenbaum v. Silverman, 589.

3. Usury.— *Semble*, that a mortgage, valid in its inception, may be purchased at a price less than its face, and is not invalidated by a subsequent extension at an usurious rate of interest. Id.

See **Assignment.**

MOTIONS AND ORDERS.

Security for costs from one authorized by statute to sue — Notice of such a motion.— Where an application is made, under the Code of

Civil Procedure, § 3721, to compel a person expressly authorized by statute to sue, e. g., an infant, to give security for costs, the motion must be made to the court, on notice, and an order made ex parte is irregular. Kamermann v. Eisner & Mendelson Co., 554.

MUNICIPAL CORPORATIONS.

1. Mortgagees of lands taken for a street opening are entitled to notice of the proceedings.— Where the charter of a city provides that, where lands are to be taken for a street opening, compensation shall be made to owners and also to persons having an interest in the property proposed to be taken, mortgagees of such lands are entitled to notice of the proceedings. Matter of Oneida Street, 235.

2. Insufficient provisions for notice to and the hearing of parties interested in a street opening.— Where the charter provides for no notice to any one, except such as might be derived from the publication and subsequent service, upon owners or persons having an interest, of a copy of a resolution of the common council declaring that it intends to take certain lands and to apply at a time and place named for the appointment of commissioners; where it requires no notice to be given that an owner or party in interest can appear at any time or place and be heard; where it provides for no notice of the proceedings before the commissioners or any opportunity to be heard; where no notice is required to be given of their report and there is no clear definition of the right of a claimant thereunder, the appointment of commissioners would violate the rule that private property cannot be taken for public use except upon just compensation and under due process of law. Id.

See **Taxes.**

MUNICIPAL COURT OF SYRACUSE.

A judgment for less than $25 is not a lien on land—Supplementary proceedings.— The provisions of section 16 of chapter 342 of the Laws of 1892, the act establishing the Municipal Court of the city of Syracuse, declaring that a judgment rendered in that court shall be subject to all the provisions of the Code of Civil Procedure, and further stating that it "shall be a lien and remain in force for the same length of time as a judgment originally recovered in the County Court," have merely the effect of extending, by the language of this latter clause, the duration of the lien of such a judgment but do not make it, when less than $25, exclusive of costs, a lien upon land; and consequently such a judgment cannot be made the basis of an order in supplementary proceedings, nor is the judgment debtor punishable, as for a contempt, in refusing to appear before a referee appointed by such an order. Andrews v. Mastin, 263.

NEGLIGENCE.

1. Measure of damages.— Where the evidence, given upon the part of a passenger injured by the alleged negligence of a street railway corporation while he was attempting to board one of its cars, tends to show that he was deprived of his earning power for five months, and that he suffered severe shock and severe pain, a verdict of $2,000 damages will not be set aside as excessive. Swoboda v. Metropolitan Street Railway Co., 8.

2. Horse, not tied, killed by a locomotive — Failure of engineer to stop.— Proof, made in an action brought to recover the value of a horse and wagon destroyed by a locomotive, tending to show that, although the horse was standing, untied, in the street, it was gentle and that its driver was near at the time of the accident, and that the locomotive, although moving so slowly that its engineer could have stopped it in a distance of thirty feet, did not, in fact, stop it at all, is sufficient to justify the conclusion that the engineer was negligent, and that the driver of the horse was not guilty of contributory negligence. Potter & Parlin Co. v. New York Central & Hudson River Railroad Co., 10.

3. Duty of one crossing a railroad — Looking but once — Presence of smoke.— Proof that a person, intending to take an accommoda-

tion train, which ran upon that one of four tracks which was farthest from him, attempted to cross the tracks at a point beyond the station where crossing was permitted, but where there was neither planking nor flagman; that he looked in both directions only at a point a few feet from the first track, and when the point of crossing was obscured by the smoke of the accommodation train which was passing on the fourth track: that he then knew that an express train, moving at the rate of thirty-five miles an hour in the same direction as the accommodation train, not stopping at the station, and which ordinarily could have been seen by him at a distance of about a mile, would be due within a minute upon the third track, and that he went forward and was killed by the express train on that track, which was distant only thirty-four feet from the point where he looked in both directions, indicates that the deceased was guilty of contributory negligence as matter of law. Mixsell v. New York, New Haven & Hartford Railroad Co., 73.

4. Duty of a pedestrian to look again, after leaving the sidewalk and while crossing a street.— Where a pedestrian has, in the daytime, looked in both directions before leaving a sidewalk and has seen no cable car approaching which would intercept her passage, and the street is free from vehicles and obstructions, and such a car gives no signal nor warning of its approach, the question whether she was guilty of contributory negligence in passing along a street crossing, while looking straight ahead and without looking again for approaching cars, is one proper for the consideration of the jury. Curtin v. Metropolitan Street Railway Co., 83.

5. Rights of cars and vehicles at street crossings — Contributory negligence.— Proof that when, about 8 o'clock at night, the driver of a truck, going westerly, attempted to cross Broadway in the city of New York at a street crossing, he looked north and south on that thoroughfare and saw a car coming north on the easterly track and distant about a block, and also saw another car coming south on the westerly track and distant about 150 feet, and that his truck was subsequently struck and he was injured by the car, on the westerly track, does not, in view of the rule that cars have, at street crossings, no greater right than vehicles, make him guilty of contributory negligence as matter of law; and the question of negligence and of contributory negligence are proper for the consideration of the jury. Dise v. Metropolitan Street Railway Co., 97.

6. Collision on the road — Presumption of negligence from the speed of a horse.— Where the proof made in an action brought to recover damages resulting from a collision caused by the alleged negligence of the defendant tends to show that he, at the time of the collision with the wagon of the plaintiff, was driving a spirited horse attached to a light wagon, and was speeding his horse with another horse also drawing a light wagon, there is a presumption that his horse was not under proper control; and hence, a judgment, rendered upon conflicting evidence, in favor of the plaintiff will not be disturbed. Kahn v. Eisler, 350.

7. Law of the road— Collision.— Where two vehicles are approaching each other on streets which meet at r right angle, neither has the right of way; but where one driver signals to the other that he will continue his present course, he has a right, in the absence of any indications to the contrary, to expect that his signal will be obeyed, and where a failure to obey results from the presence of a concealed load which prevents the driver signalled from properly controlling his team, a verdict against his employer will be sustained. Koester v. Decker, 353.

8. Lease of an unsafe bicycle.— Lessors who deliver to a lessee a bicycle, which is made of poor materials, and is in a condition unsafe for use, are liable, irrespective of the question of an express warranty, to the lessee for injuries which he sustained, by its sudden collapse, while being put to ordinary use by him, about three months after he had taken possession of it under a lease continuing for nine months. Moriarty v. Porter, 536.

9. Collision on an electric-car track — Negligence of motorman. — Proof, made in an action based upon negligence, tending to show that an electric car of the defendant was 300 feet distant when the plaintiff's truck became fixed in a hole in the bed of the defendant's track and that, although the plaintiff yelled repeatedly to the motorman to stop his car, he ran into the truck upon a clear night, and when an electric light was within fifty feet of the place of the accident, sufficiently indicates that the defendant was guilty of negligence. Saffer v. Westchester Electric Railway Co., 555.

10. Collision in a street — Contributory negligence by leaving a buggy unattended in the street, contrary to an ordinance.— Where it appears, upon the trial of an action, to recover damages for injuries alleged to have been caused by the running away of the defendant's team, left unattended in a city street, and its collision with the buggy of the plaintiff, that, contrary to a municipal ordinance forbidding, under a penalty, "any detached vehicle to remain in any public street," the buggy of the plaintiff had, before the collision, stood in such a street for more than four hours, a justice of the Municipal Court of the city of Syracuse may properly find as a fact that the plaintiff has been guilty of such contributory negligence as precludes his recovery. Davis v. Kallfelz, 602.

11. A horse left unattended in a street — Res ipsa loquitur.— The fact, that a horse, left unattended by the defendant in a public street, ran away, calls for explanation, and, when unexplained, would have called for a reversal of the judgment in his favor, had the plaintiff been free from contributory negligence. Id.

12. Charge.— In an action to recover damages for personal injuries caused by the alleged negligence of the defendant the court was requested to charge that the inflexible rule in such cases was that the jury must be satisfied that the injury was caused solely by the defendant's negligence and also that the plaintiff did not, in any way, by his own negligence or want of care, contribute in any degree to produce the same, and answered "So charged, except the word solely." Held, that as the request was read in the hearing of the jury, the limitation was prejudicial to the defendant, but that it was cured by a subsequent charge that if the jury believed, either that the injury was caused by the plaintiff's own carelessness, or that it was the result of a pure accident, they must render a verdict for the defendant. McNaughton v. Metropolitan Street Railway Co., 700.

13. Measure of damages.— Proof that prior to an accident, the person injured had been earning $35 a week; that he could not, at present, do his ordinary work without an assistant and that he could not, without assistance, lift his hand to his head, make a prima facie case for the recovery of damages for loss of occupation. Id.

14. Physical pain.—An instruction by the court that, if the plaintiff was entitled to recover, the jury might allow him compensation "for the pain and suffering he underwent and the loss he sustained, and no more," is correct. Id.

See **Bill of Particulars.**
Landlord and Tenant.
New York City.

NEGOTIABLE INSTRUMENTS.

1. After proof of fraud, the holder must show that he is a bona fide purchaser.— Where proof is made, in an action brought against the maker and indorser of a promissory note, that, although it was given by them for the specific purpose of being discounted and used in taking up a renewal note payable at a bank and upon which they were liable, it was, in fact, fraudulently diverted from that purpose, by the person to whom it was first transferred and applied by him, after discount, to his own purposes, and that, after being protested for nonpayment by the discounting bank, its amount was charged by it to his account, and apparently was subsequently paid to it by him. A person who received the note from the discounting bank, after maturity and without indorsement by it, under a transaction, stated by the cashier of the bank in the form "that note (the one in suit) I gave to Mr.

Mundy (the plaintiff)," if entitled to be regarded as having acquired title to the note, must, upon proof made of the fraudulent diversion, show the circumstances under which he came into possession of the note, and that he paid value for it. Mundy v. Pritchard, 22.

2. Bona fide holder — Acceptance for accommodation of payee.— The defense that a draft was made and accepted without consideration and for the accommodation of the payee is not available, either to the drawer or to the acceptor, as against a bona fide holder for full value and before maturity. Bernstein v. Crow, 99.

3. Admission that a corporation accepted — Estoppel by pleading.— Where the acceptor, a corporation, interposes to an action brought upon the draft an answer which expressly admits that it accepted it, that statement, under the provisions of section 522 of the Code of Civil Procedure, " must, for the purposes of the action, be taken as true," and the corporation cannot subsequently avail itself of allegations of the answer, stating that it received no consideration and that the acceptance was unauthorized, as a means of attacking the validity of the acceptance. Id.

4. Usurious discount by private banks — Counterclaim by parties accommodated, for illegal interest paid.— Where an action is brought by a private and individual banker upon a note which he has discounted for the defendants, its maker and indorser, they may successfully interpose a counterclaim based upon allegations and proof that the note was given in part renewal of one for a larger sum which, with its earlier renewals, were discounted by the plaintiff for the defendants' accommodation at usurious rates, as the plaintiff thereby became liable to them, under the banking laws of the state (Laws of 1882, chap. 409, §§ 68, 69, re-enacted in 1892, by chap. 689, § 55) for the repayment of twice the amount of the interest paid, with an accompanying penalty of the loss of all interest; nor is this construction affected by the statement, contained in the statutes of 1882 and 1892, that it is intended to place private and individual bankers on an equality " in the particulars " referred to in the section, with national banks, as this phrase only means that there shall be a uniform penalty for usury in the case of state and national banks and of private and individual bankers. Caponigri v. Altieri, 101.

5. Consideration — Storage certificates for whiskey deliverable in the future — Interested witness.— A note, given in consideration of the delivery to the maker of certain certificates which state that a quantity of whiskey is kept by the payee on storage, subject to the order of the maker, upon the payment of the purchase price, a government tax and certain charges, has a sufficient consideration; and the unsupported testimony of the maker, that the maturity of the note was to be deferred until he demanded possession of the whiskey, need not be accepted by the court as he is an interested party. Merschendorf v. Koch, 356.

6. Proof of execution. — Where an answer admits the making of a note, the note is admissible in evidence and defects in the proof of its execution are immaterial. Leonard v. Crow, 516.

7. A note executed by an alleged firm — Proof of partnership — Effect upon a general denial, of allegations of a subsequent separate affirmative defense.— Where the proof made in an action upon a note tends to show that, although executed in the name of the firm, it was made by only one member thereof with whom the plaintiff dealt, her failure to prove the partnership, denied, under a general denial, by the defendant who did not execute the note, defeats the action, nor is her failure to make such proof of partnership excused because, in a subsequent separate defense, the same defendant alleged in substance that, at about the time alleged in the complaint, he gave the plaintiff a similar note executed in the firm name, and that this was not to be paid until he was able to pay it, as allegations, contained in a subsequent separate affirmative defense, are not available as admissions, nor can they affect the force of the general denial contained in the prior defense. Kelly v. Theiss, 530.

8. Money paid on a raised check. — Proof that the innocent indorser of

a raised check deposited it with his bank, that the latter through its agent collected the proceeds of the drawee in a foreign state, that thereafter the teller of the bank, after inquiry made of its discount and collection clerk, stated to the indorser that the check was "all right" and that, after the indorser had checked out most of the proceeds of the check, the forgery was discovered by the drawee, was reported to the bank and the indorser promptly notified thereof, entitles the bank to recover of the indorser the money paid. Oppenheim v. West Side Bank, 722.

9. **Warranties of indorser.**— An indorser of a check warrants, as to the drawee, the genuineness of the instrument and that of all preceding indorsements. Id.

10. **Warranty of drawee.**—The drawee of a check is held to a knowledge of the genuineness of the signature of the drawer but not as to the genuineness of the body of the instrument. Id.

11. **Authority of a bank teller.**— The statement of a bank teller that a check, deposited for collection and which had been paid by the drawee, was "all right," must be limited to the mere fact of payment and does not estop the bank from subsequently alleging, as against the depositor, that the check had been altered. Id.

12. **Diversion — Burden upon bona fide holder.**— Where the defendants have proved that a note has been wrongfully diverted from the purpose for which it was given, the plaintiff, in order to constitute himself a bona fide holder, must prove that he took the note in good faith and without knowledge of the wrongful diversion. Berman v. Zuckerman, 744.

NEW TRIAL.

1. **Practice on setting aside a general verdict, directed upon a special verdict — Dismissal of complaint.**— Where a general verdict, directed to be entered upon a special verdict rendered under the provisions of section 1187 of the Code of Civil Procedure, as amended in 1895, and covering both issues of fact and the amount of damages, is set aside by the trial judge, together with the special verdict, he has power, although he has already once denied a motion made to dismiss the complaint, to reconsider that motion and, upon concluding that in no view of the evidence and findings can the plaintiff recover, may dismiss the complaint, with costs, as the plaintiff is shown not to be entitled to a new trial of the action. Mixsell v. New York, New Haven & Hartford R. R. Co., 73.

2. **For newly-discovered evidence — Powers of Appellate Term on appeal from a District Court — Evidence receivable upon appeal.**— The Appellate Term of the Supreme Court cannot grant a new trial upon the ground of newly-discovered evidence where the appeal is taken from the judgment of a District Court of the city of New York; nor can evidence be received upon appeal for the purpose of reversing a judgment, as it is only admissible where it tends to sustain the judgment. Flanagan v. Callanan, 139.

3. **Powers of a justice of a District Court.**— *Semble*, that a justice of a District Court of the city of New York has no power, after judgment rendered upon litigated issues, to grant a new trial upon the ground of newly-discovered evidence, as his jurisdiction extends only to a motion made upon the grounds specified in section 999 of the Code of Civil Procedure (Laws of 1896, chap. 748). Id.

4. **Newly-discovered evidence — Requisites.**— Where the defense, to an action upon a policy of fire insurance, is that the pretended loss was the result of a conspiracy to defraud and that the damage was slight, and the proofs of loss served show that the plaintiff's vendor, as to a part of the property destroyed, was his brother and it appears that he, although present in and a resident of the city where the action was tried, was not called as a witness, and then by the plaintiff, until the day before the close of a trial lasting five days, a new trial will not be granted in order to permit the defendant to confute, by alleged newly-discovered evidence, the testimony of the brother, elicited upon cross-examination, that he paid his

vendor living in a neighboring city, a price much larger than that which he in fact paid him, as it does not sufficiently appear that the defendant could not, by reasonable diligence, have obtained the proposed new evidence before the trial, nor is it apparent that it, if given, would have been likely to change the result. Simon v. Long Island Mutual Fire Insurance Co., 471.

NEW YORK CITY.

1. **Powers, under the new charter, of a commissioner of deeds in a county other than New York.**— A person appointed under the charter of the city of New York (Laws of 1897, chap. 378, § 58) by its board of aldermen as a commissioner of deeds of said city and who, within the statutory period prescribed, took, subscribed and filed his oath in the office of the city clerk of said city and who, thereafter, filed a certificate of his appointment in the office of the clerk of the county of Kings and there took, subscribed and filed in its county clerk's office the oath required by law, is qualified to take oaths, affirmations, proofs and acknowledgments in any of the boroughs of the city of New York, and the registrar of Kings county may be compelled by mandamus to accept his certificate to the satisfaction of a mortgage. People ex rel. Title Guarantee & Trust Co. v. Haggerty, 296.

2. **Sheath-piling not required by law in sewerage excavations — Negligence — Erroneous charge.**— The provisions of the Consolidation Act (Laws of 1882, chap. 410, § 473, as amended by Laws of 1885, chap. 456, Laws of 1887, chap. 566, and Laws of 1892, chap. 275), relative to placing sheath-piling in excavations in public streets of the city of New York, do not relate to excavations for sewerage connections, as they are, by the same statute, placed under the exclusive control of the common council; and hence where an employe of a contractor with the city to connect a public sewer with adjoining property brings an action against the contractor to recover damages for injuries sustained by the fact that the banks of an excavation caved in, it is erroneous for the court to charge the jury that a person violating an express statute is a wrongdoer and as such is negligent in the eye of the law, and that the mere omission to comply with the statute is prima facie evidence of negligence, as such a charge ignores the material questions whether sheath-piling was, under the circumstances, necessary, whether the danger was not obvious and whether the plaintiff himself did not create the very danger of which he now complains. Hayes v. Fay, 320.

3. **Discharge of municipal liens.**— As the General Lien Law (Laws of 1897, chap. 418) did not expressly repeal the provisions of the Consolidation Act (Laws of 1882, chap. 410, § 1836, as amended by the Laws of 1895, chap. 605), relative to the manner of discharging liens filed against funds held by the city of New York, an undertaking which follows the terms of the Consolidation Act is still a proper method of discharging such a lien. Ruge v. Gallagher, 572.

4. **Excavations in — Rights of licensee.**— *Semble*, that a licensee of an adjoining owner of lands in the city of New York has, under the Consolidation Act (Laws of 1882, chap. 410, § 474), a right to maintain timbers which he has thrust through the basement wall of the adjoining owner, in order to make an excavation on his own lot, until the time when he has built up a new wall which will so support the wall of the adjoining owner "that it shall remain as stable as before the excavations were commenced." Wetterer v. Soubirous, 739.

See **Eminent Domain.**
Office and Officer.

OFFICE AND OFFICER.

Title of subsequent appointee cannot be determined on application for mandamus to reinstate.— Where a veteran and a member of the uniformed fire force of the city of Brooklyn is, as alleged, illegally removed from his position as a fire marshal of the city of Brooklyn by the fire commissioner of the city of New York, acting under the powers given him by its charter (Laws of 1897, chap. 378, §§ 729-779) and a successor is appointed who qualifies and

enters upon his duties, the court will not pass upon the title of the present appointee, holding office by color of title, in a proceeding instituted by the claimant by an application for a writ of peremptory mandamus, but will remit the claimant to his remedy by an action in the nature of a quo warranto. People ex rel. Brymer v. Scannel, 298.

PARTIES.

1. **Demurrer — Defect of parties defendant.**—A complaint is not made demurrable for a defect of parties defendant, unless it appears upon its face, that a person or persons have been omitted who should have been included. Kugelman v. Hirschman, 533.

2. **Omission of directors, jointly and severally liable.**—Where the directors of a nursery and child's protectory are, by the Membership Corporations Law (Laws of 1895, chap. 559, § 11) made jointly and severally liable for its debts, a complaint for goods sold and services rendered to them, is not made demurrable because it merely states that the defendants sued "were directors" and does not state whether, during the period covered by the complaint, they did or did not constitute all the directors. Id.

See **Foreclosure.**
Partnership.

PARTITION.

1. **A bequest which permits the life tenant to use the principal — A remainderman allowed his payment of the funeral expenses of the life tenant.**— Where the will of a testator bequeaths to his wife all his real and personal property during life and directs that if, at her death, "anything should be left after all her just debts are paid," the same should be divided equally between his three children, the bequest authorizes the wife to use the principal, if the income proves insufficient for her support, and, therefore, a child who has paid the funeral expenses of her mother, is entitled to be allowed, in an action brought to partition the real estate of the testator, the amount of this payment, as it may be deemed to represent one of the "just debts" of the life tenant. Smith v. Gilliatt, 246.

2. **Reply of alleged heirs attacking a will, established as against them — Final judgment on demurrer.**—Where it appears from the pleadings in an action, brought by alleged heirs-at-law to partition lands formerly of a testatrix and also attacking her will, that the plaintiffs are her sisters, that she left an only son, whose will has been judicially established by a judgment in an action to which the plaintiffs were parties, and that his will made no provision for them, a reply interposed by them, which attacks his will and also alleges that the judgment establishing it was fraudulent and void, is a mere statement of a legal conclusion; and as the plaintiffs show no right to maintain the action as heirs-at-law of the testatrix, the defendants are entitled to final judgment. Henriques v. Miriam Osborn Memorial Home, 653.

See **Pleading.**
Will.

PARTNERSHIP.

1. **Option to buy out other partners — Effect of failure of purchasing partner to perform — Rescission — Counterclaim.**— Where the terms of a partnership agreement give one partner the option, at the close of the partnership, to buy out the interests of the others, and he, after an adjustment had, fails to pay them the sums found to be due them, they are entitled to rescind the agreement of optional purchase, and may subsequently maintain, against him, the ordinary action for an accounting, and for the appointment of a receiver of the firm assets; nor can he, upon the theory that the title to the firm property has passed, and that he was liable merely for the balance of the purchase price, successfully interpose a counterclaim which alleges, in substance, that the other partners had for some months prior to the close of the partnership, impaired the value of the business and its good will by undermining it to the advantage of rival firms, as he, by neglecting to pay the other partners for their shares, entirely failed ever to gain any title

to the firm property. Brown v. Dennison, 55.

2. **Evidence.**— Testimony given in an action, by which the plaintiff seeks to hold the defendant as a partner in a firm, that when the plaintiff's agent came to him to secure railroad advertising, stating that he (the agent) had seen his (meaning the firm's) advertisement in certain other cars and asking it for those controlled by his principal, the defendant said, "I don't attend to any advertising for the firm; my brother does all that, and you will have to call and see him," tends to show that the defendant at least held himself out as a partner and justifies the court in refusing to charge the jury that the testimony, even if true, is insufficient to charge the defendant with the firm debt. Gilroy v. Loftus, 105.

3. **The administrator of the deceased general assignee of a firm takes no title to its assets — Trademarks.**— The administrator of the deceased general assignee of a firm takes no title to the firm assets, and hence a former partner of the firm, who claims title to one of its trademarks, under a transfer made by the administrator without authority of the court, cannot maintain an action to restrain its use by his partner in a new firm, formed after the old firm had made a general assignment. Hayne v. Sealy, 243.

4. **Notice of change — Parties.**— Where a vendee gives vendors, with whom he has had prior business transactions, no notice, either directly or inferentially by a change in the form of his checks and business cards, that he has taken a partner, the vendee remains solely liable for goods sold, and cannot insist that his partner is a necessary party to an action for their price. Horowitz v. Pakas, 520.

5. **Partners cannot sue each other at law — Fraud.**— A firm cannot maintain an action against one, who is a partner in its drug department, to recover damages which may result to the firm from the purchase by the defendant from a third party of a single consignment of orange peel for delivery to a customer, a company which subsequently denied the order; and as a partner has authority to purchase, an order for his arrest, based upon the ground of fraud and false and fraudulent representations, must be vacated. Leber v. Dietz, 524.

See **Fraudulent Conveyance.**
Joint Adventure.
Negotiable Instruments.

PATENTS.

See **Contract.**

PAYMENT.

See **Executors and Administrators. Services.**

PENAL CODE.

§ 456. People v. Johnson, 150.

PLEADING.

1. **Amendment — Substitution of its receiver for a company — Inadvertence.**— The court has power, under Code of Civil Procedure, section 723, to amend the summons and complaint in an action, begun in the name of a company, by substituting its receiver, in whom the cause of action was vested when the action was begun, as the substitution does not bring in a different party and as a mistake, caused by mere inadvertence, should be remedied. Hulbert Bros. & Co. v. Hohman, 248.

2. **Unauthorized interlocutory judgment — Waiver by appeal.**— Where an interlocutory judgment, overruling a demurrer to a complaint, is reversed, on appeal, with leave to the plaintiff to amend upon payment of costs, the defendant is not authorized to enter an interlocutory judgment providing that, upon the failure of the plaintiff to amend within twenty days, the defendant should, without application to the court, have final judgment dismissing the amended complaint with costs, nor has he any right thereafter to enter of his own motion such a judgment, upon such a failure to amend in time; but where

the plaintiff, instead of moving to correct the interlocutory judgment, appeals therefrom to the Court of Appeals, his action waives the defect. Swan v. Mutual Reserve Fund Life Association, 256.

3. **Stay by appeal to the Court of Appeals — Undertaking — Vacation of interlocutory judgment.**— Where, however, the plaintiff gives an undertaking upon the appeal to the Court of Appeals, which complies with Code of Civil Procedure, section 1326, proceedings under the interlocutory judgment are stayed; and as its existence may embarrass the plaintiff in that court, the Supreme Court will, as a matter of discretion, vacate it. Id.

4. **Denial.**— A denial in an answer is not "a defence," and may not be pleaded as or in a defence. Denials and defences are distinct both in name and substance. Green v. Brown, 279.

5. **Demurrer.**— Only new matter, namely, matter not embraced within the issue raised by a general or special denial, may be pleaded as a defence; and the fact that in a pleaded defence is found a reiteration of a previous denial, is no reason for refusing to sustain a demurrer to such defence, when the new matter pleaded in it does not constitute a defence. A denial in a defence is mere surplusage, and not to be regarded. Id.

6. **Equities — Answers alleging payment of advances.**— Where the plaintiff, after making the allegations usual in an action to partition lands, formerly of a decedent, asks as equitable relief that he be first paid out of the proceeds, moneys which he individually paid to perfect the title of the decedent, his father, the defendants may properly interpose answers which, in substance, allege that the moneys claimed to have been paid by the plaintiff were in fact moneys of his father's estate or, in the alternative, that, soon after the plaintiff made his alleged payment, he received from his father's estate moneys belonging to it sufficient to reimburse him. Phillips v. Phillips, 475.

7. **An amendment changing the defense.**— Where the answer admits the plaintiff's claim, and alleges an equitable set-off, which is disallowed, the defendant cannot, at a time when the trial has nearly closed, be allowed to amend its answer by denying the material allegations of the complaint and by alleging a very large legal counterclaim, as such an amendment would create new issues and would practically necessitate a trial de novo. McGill v. Holmes, Booth & Haydens, 514.

8. **Amendment — Allegation as to the residence of a corporation.**— Where the defendant denies the allegation of a complaint that it is a domestic and alleges itself to be a foreign corporation, a referee may at the close of the case, and although the defendant has given no evidence, properly permit the plaintiff to amend by alleging that the defendant is a foreign corporation. Clokey v. International Rubber Clothing & General Supply Co., 518.

9. **Breach of contract for a sale of goods — General denial — Insufficient "defence," stating no new matter.**— A general denial, interposed to a complaint for a breach of a contract to sell and deliver goods, puts the plaintiff to proof of the entire contract, and enables the defendant to prove any facts which go to show that it was not made; and hence a "defence," subsequent to the general denial, which alleges that a person with the same surname as, but a different Christian name from, that of the plaintiff asked the defendant to manufacture for him the same goods, and that it refused to do so because a required deposit was not given, must be stricken out, as it states no new matter and is not a defence, within the Code of Civil Procedure, section 500, subdivision 2. von Hagen v. Waterbury Manufacturing Co., 580.

10. **Services — Insufficient defence, stating the cause of discharge — Bill of particulars.**— An allegation, that the defendant discharged the plaintiff from its service "for good and sufficient cause, and particularly for disloyalty to its interests, and for conduct and actions harmful and injurious to its business," states no new matter, i. e., facts constituting a defence, and is a mere conclusion of law; but where the plaintiff

has treated it as a defence, the defendant may properly be compelled, by an amended answer or by a bill of particulars, to give the specific facts and the time of their occurrence. Hicks v. New Jersey Car Spring & Rubber Co., 585.

See Contract.
Corporations.
Counterclaim.
District Courts
Insurance (Fire).
Insurance (Life).
Lunatics.
Negotiable Instruments.
Parties.
Partition.
Partnership.
Railroads.

PLEDGE.

See Insurance (Life).

POOR.

Settlement — Effect of Laws 1897, chapter 203.— The provisions of chapter 203 of the Laws of 1897, which took effect on April 7, 1897, and enacted that "A person who has gained a settlement in a town or city loses the same by a continuous residence elsewhere for one year," were intended by the legislature to fix the status of a person who had, for one year prior to April 7, 1897, continuously resided in a place other than that where he had gained a settlement; and hence, a poor person who, prior to 1891, had a settlement in the town of Onondaga, and who, in that year, removed to the city of Syracuse, where he subsequently resided until September, 1897, although still supported by the town of Onondaga, can, since the passage of the statute, no longer be made a charge upon the town of Onondaga, but must be supported by the city of Syracuse. Matter of Town of Onondaga, 265.

POWERS.

A power of sale passes to the administrator with the will annexed — His duty to pay legatees. — Where the will of a testatrix gives her executor an express power to sell her real estate as soon as practicable after her death and directs him to pay the proceeds to legatees named, the power passes, upon his death, to an administrator with the will annexed and imposes upon him the same powers and duties. Campbell v. Jennings, 406.

PRINCIPAL AND AGENT.

See Agency.

PROMISE.

For the benefit of a third person, a firm creditor — Consideration — Intention to benefit third party.— A written agreement by which a partner, for "a good and valuable consideration" received of the committee of the person and estate of another partner, promises to pay the firm debts and to indemnify the committee against them, when accompanied by no proof of a transfer of the firm assets to the promisor nor of any consideration moving to him beyond that recited, is not available to a third party, a firm creditor, to whom it would be beneficial, as the burden is upon him to show that it was the intention of the parties to the agreement, which by its terms indemnifies the committee alone, that it should also benefit firm creditors. Lennon v. Lyon, 505.

RAILROADS.

1. Improper joinder of causes of action.— In a complaint in equity for an injunction against the continuance and operation of an elevated railroad through a street, unless the damages caused thereby to certain abutting real property be paid, the executors of the deceased owner of the abutting real property, and the present owner by devise from her united as plaintiffs, alleging that they were the owners of the said property, and asking that all of the damages from the beginning be assessed, and that the company be restrained from continuing and operating the road, unless such damages be paid. Held, that two causes of action, viz., that of the executors and

that of the owner, were improperly united, but that objection was waived for not having been pleaded. Jacobson v. Brooklyn Elevated Railroad Co., 281.

2. Jury trial — Waiver.— Also, held, that the cause of action of the executors shown by the evidence was not equitable, but only a common-law action for damages; but that the defendant did not waive objection to its being tried in equity, and its right to a jury trial, by not pleading that there was an adequate remedy at law, for the reason that such cause of action did not appear by the complaint, which, on the contrary, stated a good equitable cause of action only, against which such plea could not be interposed. Id.

3. Dismissal of complaint.— Also, held, that such common-law cause of action having appeared by the evidence, the defendant was entitled to have the complaint as to it dismissed; but having instead asked that it be sent to the jury calendar, that course should be followed. Id.

See **Constitutional Law.**
Negligence.

RECEIPT.

Omission of stenographer's fees — Relief.— Where attorneys stipulate that stenographer's fees shall be a part of the referee's fees and shall be paid by the party taking up the report, a mistake by which the attorney prevailing gave a receipt in full and discontinued the action, without entry of judgment, upon payment of an amount which did not, to the knowledge of the attorney opposed, include the stenographer's fees, may properly be corrected, the receipt and discontinuance be set aside and the parties prevailing be allowed to enter judgment for the stenographer's fees. Adams v. Moore, 451.

RECEIVER.

See **Corporations.**
Fraudulent Conveyance.

RELEASE.

Consideration — Fraud and undue influence — Burden of proof.— Releases, executed by an intelligent woman over eighty years of age, to her son of all claims against him as her agent in collecting the income of her life estate under the will of her husband, should not, in an action for an accounting brought against him by her administrators, be set aside as procured by fraud and undue influence, merely because they lack a valuable consideration, for, where it appears that the son was the favorite of his parents, that he and his family lived with his mother, and that he was largely preferred over other children by the will of his father, the legal presumption that the dominant party has taken advantage of the weaker is sufficiently rebutted. Ferris v. Ferris, 577.

REPLEVIN.

1. Conditional sale — Form of judgment for plaintiff.—Where a piano is sold upon a condition precedent of full payment, the vendor may maintain replevin against one who purchased it in good faith at an auction sale; and as the vendor is entitled to possession, the judgment must award it to him in the form prescribed by section 730 of the Code of Civil Procedure (made applicable to District Courts of the city of New York by Laws of 1882, chap. 410, § 1343); and a judgment by which the justice of such a court directs that if the defendant shall pay into the court the amount still due and unpaid upon the piano, together with certain costs, he shall have judgment for its return without costs, is wholly unauthorized. Fischer v. Cohen, 117.

2. When the verdict need not fix the value of the chattel.— There is no statutory provision, which requires the verdict, in an action of replevin, to fix the value of the chattel where the verdict awards possession of the chattel to the person to whom it has been delivered by the officer. Id.

3. A claimant under a fraudulent vendee must, as against the true owner, show himself to be a bona fide purchaser.— Where ven-

dors disaffirm a sale of goods, as procured by fraud, and bring an action to recover the property, a party in possession of it, and who claims it under the fraudulent vendee, must prove himself to be a purchaser in good faith for value and without notice. Levy v. Yazbeck, 136.

4. **Bona fide purchaser — Evidence — Consideration — Interest of witness.**— Proof, dependent solely upon the testimony of the defendant, that the fraudulent vendee, who was indebted to him for the purchase price of the very business in which the indebtedness in question was subsequently contracted, and who had given his note for the price of the business, afterward transferred the whole stock of goods, including those in question, to the defendant in return for his own past-due note, while sufficiently proving the defendant to be a bona fide purchaser, need not be accepted by the trial court as proof of that fact; as the question of the credibility of an uncorroborated interested witness is one exclusively for the court. Id.

RESCISSION.

See **Partnership.**

RIOTS.

See **County.**

SALE.

1. **To whom the credit was given — Evidence.**— Where the issue, in an action for goods sold, brought against a father, is whether he or his son, bearing the same Christian name, bought the goods, the father may properly be allowed to show that his son paid the rent of the store; that the father had no interest in it; that the name of the son was displayed on the sign and, by the testimony of daughters, engaged in the store, that they never knew their father to order goods. Nichols v. Nehrbass, 90.

2. **Evidence—Similarity in name.** — Where two persons sought to be charged for goods sold, both bear the name of Philip Nehrbass, it is proper for the court to charge the jury that the fact that the name — Philip Nehrbass — was signed to receipts given for the goods upon their delivery is no evidence that the father ordered them. Id.

3. **Rent for use — Effect of retaking by vendor.**— Proof, made in an action brought for a balance of rent alleged to be due by the vendee upon a conditional sale of two bicycles, that the duplicate agreement, executed in each case, states that the vendee had rented the bicycles from the vendor for the term of ten months, "for the use and depreciation of which" the vendee agreed to pay $105, within ten months at periods fixed; that, upon a failure to pay, the vendee would return the bicycles or, in the alternative, that the vendor might lawfully take possession of them and that, upon full payment, the vendor would execute to the vendee a bill of sale, accompanied by proof that the vendee had the use of the bicycles for sixteen months, when the vendor, before action brought, retook and accepted them and that it now holds them subject to the statutory right of the vendee to redeem from a conditional sale, entitles the vendor to maintain the action. Equitable General Providing Co. v. Potter, 124.

4. **Res gestae — Unsigned copy of an agreement of conditional sale.**— Where the complaint states two causes of action, one for goods sold conditionally and the other for goods sold absolutely, and the defendants claim that the goods alleged to have been sold absolutely were comprised in the conditional sale, they may prove, as a part of the res gestae, an unsigned instrument, furnished by the plaintiff, purporting to be a copy of the conditional agreement of sale and dated the same day, which does not show the articles which the plaintiff claims were sold absolutely. Wolf v. Di Lorenzo, 323.

5. **Goods not in existence.**— Goods which, at the time of their alleged absolute sale, had been destroyed by fire, cannot be made the subject of sale. Id.

6. **A machine to be repaired by the vendor after sale — Resale — Waiver.**—Proof, in an action brought

to recover the price of a machine, that it was not in good repair and was purchased by the vendee upon the terms that it should be paid for in thirty days after it had been put in perfect order at the expense of the vendor, that it had been then tried by the vendee and had proved satisfactory, accompanied by proof that, after making very slight repairs, the vendee, within a week of the purchase, sold it to a third person, entitles the vendor to recover the price, as the vendee has accepted the benefit of the purchase, and, by the resale, has waived its right to have the vendor repair the machine. Levison v. Seybold Machine Co., 327.

7. **Vendee not present at nor occupying the place of delivery — Bills made out to a third person.**— Where it appears in an action, brought to recover the price of goods, that the bills for the goods sold and delivered were made out to the son of the defendant, that the defendant did not occupy and was not present at the place of delivery at the time of the deliveries, and where the plaintiff is in doubt as to the particular year in which he made them, a judgment in his favor must be reversed. Woetjen v. Gellert, 331.

8. **An offer must be accepted.**— Where a vendee alleges that certain of a lot of skirts delivered to him were not those selected by his agent, but offers to buy those which are satisfactory to him, and this offer is declined by the vendor, to whom the goods are subsequently returned, he cannot subsequently recover for those which the vendee offered to take, as an offer, not accepted, is not binding upon either party to a contract. Blum v. Daly, 342.

9. **Construction of contract — Evidence.**— Where the only issue, in an action brought to recover the purchase price of a shed upon a pier, is whether the vendee, in reselling to the vendors, at a price fixed and as junk, certain trusses of the shed, also included the timbers which were attached to the iron trusses and which the vendors took, it is erroneous for the court to preclude the vendor from showing the value of the iron as junk, as such proof would tend to show what materials were intended by the parties to be sold for the price fixed. Staats v. Hausling, 526.

10. **Action for the price — Contract making performance optional — Forfeit.**— Where a contract for the sale of a block of stock, to be paid for at times and in amounts stated, also provides that, if the vendee fails to pay the sums specified in the manner specified, he shall forfeit his stock, that it shall revert to the vendor, and that all claims against the vendee shall cease, no action for the price can be maintained against him for his failure to perform fully, as he has an option whether he will take the stock and pay the balance due upon the contract, or allow the stock to be forfeited and revert to the vendor. Gallup v. Sterling, 672.

11. **Tender.** — A vendor cannot maintain an action for the price of stock where he is unable to tender it, because it is pledged to third persons. Id.

See **Replevin.**

SAVINGS BANKS.

See **Taxes.**

SECURITY FOR COSTS.

A general assignee is not an "official assignee."— The provisions of section 3268, subdivision 4 of the Code of Civil Procedure, enacting, in substance, that where the plaintiff was, when the action was commenced, "the official assignee" of a debtor and where "the action is brought upon a cause of action arising before the assignment," the plaintiff may be compelled to give security for costs, have no application to a general assignee for the benefit of creditors, nor can he be compelled to give security in an action brought by him upon a cause of action which accrued before the general assignment was made to him. Lintner v. Long Island Mutual Fire Insurance Corporation, 305.

See **Motions and Orders.**

SERVICE.

See **City Court of New York.**

SERVICES.

1. Work, labor and materials — To whom the credit was given.— Proof, made in an action brought to recover for work, labor and materials, tending to show that the plaintiff had formerly furnished goods to a hotel association at Long Beach upon the terms that he was to be paid therefor in board at the hotel; that, after he had declined to accept such an arrangement in the future an employee of the association, who was also a hotel proprietor in New York city, ordered goods for the hotel at Long Beach upon his own credit; that the goods were charged and sent to the defendant personally; that he subsequently made repeated promises, by telegram, that he would pay the debt, and that, finally, when the hotel was about to close for the season, changed his position and claimed that the debt was that of the hotel association, is sufficient to justify a recovery by the plaintiff against the defendant. Morris v. Murray, 1.

2. Estimate of cost — How it may be sent.— Where the owner of a brougham has authorized a livery-stable keeper to have it repaired, the contractor may properly address and send an estimate of the cost of the repairs to the owner at the livery stable instead of at his private residence; or such an estimate may be sent directly to the livery-stable keeper as being the agent of the owner. Dunham v. Harlam, 318.

3. Farm worked on shares — Acts usually gratuitous — Express promise.— Where a tenant, who has agreed to work a farm on shares, claims for services of a nature usually rendered gratuitously by one in his situation he must show an express promise upon the part of the owner to pay him therefor, or must prove circumstances from which such a promise can be implied. Pulver v. Esselstyn, 429.

4. Statute of Limitations — Mutual accounts.— The tenant cannot save his demand from the bar of the Statute of Limitations, upon the theory of an open mutual account existing between the parties, by proof of an account which does not show that the owner was indebted to him in any manner whatever, except for an unknown quantity of hay which the tenant marketed, as to which he testified that he, of his own motion, gave the owner "credit on account" for his share and which might properly be deemed to have been a mere payment by the tenant of his debt to the owner. Id.

5. Presumption that a payment is in full.— A payment made by a debtor to his creditor will be presumed to be in full; and if the debtor has evidence to the contrary and fails to produce it, he must submit to the presumption, although unfavorable to his case. Id.

6. Charge of court.—Where the main issue in an action for services is whether the plaintiff gave credit to the defendant or to an association of which he was the manager, a charge to the jury that, if the defendant said "You (the plaintiff) are to look to me for pay," the plaintiff is entitled to a verdict, does not limit the jury to a consideration of these words only where the court subsequently calls their attention to the other evidence in the case and directs them to determine the original agreement between and the intention of the parties. Morris v. Murray, 697.

See **Corporations.**
Pleading.

SET-OFF.

Action to compel the offset of a judgment rendered between the same parties, in regard to which an appeal is pending.— An undertaking, given under Code of Civil Procedure, section 1327, upon an appeal to the Court of Appeals, suspends all proceedings upon the judgment appealed from until a final decision is had; and hence such a judgment, although merely for costs, cannot, pending such an appeal, be set off, by means of an action by the respondent in the Court of Appeals, against a subsequent judgment, not appealed from by and recovered against him in the Supreme Court for costs by the same persons who were appellants in the Court of Appeals. De Camp v. Thomson, 385.

SPECIFIC PERFORMANCE.

Contract involving numerous acts, extending over a considerable time.— A complaint, in an action brought to procure the specific performance of a contract and an injunction, which alleges a breach by the defendants of an executory contract under which the plaintiff, a corporation dealing in patterns, was permitted to establish for two years an agency in the department store of the defendants, the agency being conditioned upon numerous provisions for the performance, from time to time, of acts for the mutual benefit of the parties in regard to which differences might easily arise, does not state facts sufficient to support a cause of action, as the court will not award a specific performance of a contract where it is evident, from its terms, that the action of the court will not be final and that its aid and intervention is likely to be repeatedly sought by the parties during the entire term of the contract. Standard Fashion Co. v. Siegel-Cooper Co., 624.

STATUTE OF LIMITATIONS.

See **County.**
Decedents' Estates.
Services.

STATUTES.

1. Construction of — Repeal of a whole act except one section — Scope of repealing act, Laws of 1895, chapter 559.— The fact that all the other sections of chapter 319 of the Laws of 1848 were repealed by the Membership Corporations Law (Laws of 1895 chap. 559) does not give section 6, excepted from the repeal, any new force nor make it a part of the Membership Corporations Law; as the apparent purpose of the exception was merely to indicate an intention that institutions already organized under chapter 319 of the Laws of 1848 should continue to be subject to the restriction, contained in section 6, as to bequests made within two months of the death of the testator. Matter of Lampson, 199.

2. Portions excepted from repeal are not engrafted on repealing act. — Where portions of a law are excepted from repeal by the schedule annexed to the various laws prepared by the Statutory Revision Commission, the portion so excepted does not become engrafted upon the law to which the repealing schedule is attached. Id.

3. Same.— For the purpose of determining what force should be given to a portion of a statute excepted from repeal, resort may be had to the act itself as it stood at the time of the repeal. Id.

See **Constitutional Law.**
Lunatics.
Will.

SUMMARY PROCEEDINGS.

1. Petition by grantee of life tenant.— An allegation contained in a petition, made the basis of summary proceedings to dispossess a tenant, stating that the petitioner became the owner of the premises in question by a deed from a life tenant of them, and that the defendant was in possession under an alleged agreement for hiring made with the life tenant, is sufficient to establish the relation of landlord and tenant between the immediate parties to the proceeding. Griffin v. Barton, 228.

2. Cannot be based on notice to quit, served by grantor after delivery of deed.— A grantee of leased premises cannot maintain summary proceedings based on a notice to quit, served on the tenant by his grantor, after the delivery of the deed. Id.

3. Verification of petition.— A verification of a petition, made to institute summary proceedings, which alleges that the petition is true to the knowledge of the deponent "except as to the matters therein stated upon information and belief" is insufficient to confer jurisdiction. Id.

4. The City Court of Albany has no jurisdiction to try an equitable title asserted by the landlord.— A judge of the City Court of Albany, a court of limited jurisdiction, has no power, in summary proceedings, to pass upon anything except the legal title of the landlord; and the admis-

sion of evidence tending to show that a deed from the landlord to the occupant, and under which she claimed possession, was not delivered as an absolute conveyance, but that the landlord verbally reserved the use and occupation during life, is erroneous, as the provisions of Code of Civil Procedure, section 2224, permit the tenant alone to interpose an equitable defense in summary proceedings. Matter of Hattersley v. Cronyn, 259.

5. Eviction.— An eviction is a defense to summary proceedings to recover the possession of premises for the nonpayment of rent. Wetterer v. Soubirous, 739.

6. Attornment.—It is not necessary that a tenant should attorn to his landlord in order that the latter may maintain summary proceedings. Id.

7. Ouster of jurisdiction by plea of title.— The provisions of section 2956 of the Code of Civil Procedure, relative to the ouster of a justice's jurisdiction upon the interposition of a plea of title, have no application to summary proceedings. Id.

SUPERVISORS.

See **County.**

SUPPLEMENTARY PROCEEDINGS.

1. An examination of the debtor should not be denied merely because he has real property subject to levy.— The right, secured to a judgment creditor by section 2435 of the Code of Civil Procedure, to examine a judgment debtor in supplementary proceedings upon the return of an execution unsatisfied, cannot be denied the creditor unless he has been in collusion with the sheriff or has been guilty of fraud relative to the return; and an order, vacating an order for an examination of the judgment debtor, made upon his affidavit that he is seized and possessed of real property subject to levy upon execution, is improper. Eleventh Ward Bank v. Heather, 87.

2. Statement, of the residence of the debtor, in the disjunctive.— An affidavit for an order to examine a third party in supplementary proceedings, which states that an execution upon the judgment was delivered to the sheriff of the county "where the said judgment debtor then resided and where the judgment-roll was filed, then resided and yet resides, or has at the time of the commencement of these proceedings a place for the regular transaction of business," must be deemed to state the residence and place of business of the debtor in the disjunctive, and is insufficient as the defect is jurisdictional; and, therefore, a notice of motion to vacate the order need not point out the defect. Matter of Zelie v. Vroman, 486.

3. Property affected and exempt. — Proceedings supplementary to execution are directed against property which, at the time of the order for his examination, the judgment debtor has in his possession or under his control, or which is actually due to him; and no property subsequently acquired, nor any future earnings of any kind, or earnings for personal services rendered within sixty days preceding the order, if necessary for the use of his family, can be reached either as against him or as against third parties who are alleged to have in their hands property of the judgment debtor. Matter of Trustees of the Board of Publication and Sabbath School Work, 645.

See **Municipal Court of Syracuse.**

SURETY COMPANIES.

See **Bonds.**

SURROGATE'S COURT.

See **Will.**

SUSPENSION OF POWER OF ALIENATION.

See **Will.**

TAXES.

1. Taxes received from a railroad must be applied to town bonds issued in its aid — Insufficient defenses.— The provisions of the Mu-

nicipal Law (Laws of 1892, chap. 685, § 12) absolutely compel a county treasurer to apply taxes, which have been received by him and by his predecessors from the property of a railroad situate in a town, to the purchase of town bonds which have been issued in aid of its construction or to the creation of a sinking fund in the manner prescribed by statute; and an application by a taxpayer of the town, to compel such action upon the part of a county treasurer, cannot be successfully resisted by an answer which alleges that the granting of the application will necessitate a new apportionment sheet which cannot be made and filed within the time required by law; that the county treasurer, upon his entry in office, found no such sinking fund; that the town has not paid over to him the proportion of its taxes proper for the purposes of the application; that no such claim upon him has ever been made before, and that he has no funds for the purpose sought. Matter of Walsh v. Richards, 610.

2. Presumption that the county treasurer has funds.— Where the accounts of a county treasurer's office show that, during a period of five years, the balance of the general fund has exceeded the amount paid by the railroad company for town taxes, a presumption arises that the fund is still in the hands of the county treasurer and hence it must be applied as the statute directs. Id.

3. The surplus of a savings bank is not taxable.— The relation of a savings bank to its depositors is that of debtor and creditor, and its surplus fund, accumulated under the Banking Law (Laws of 1892, chap. 689, § 123), in equity belongs to them; and hence it is, under the provisions of the Tax Law (Laws of 1896, chap. 908, § 4, subd. 14), exempt from taxation as "the deposits in any bank for savings which are due depositors;" nor can such a tax be sustained, under Laws of 1866, chapter 761, section 7, as amended by Laws of 1867, chapter 861, as one upon a franchise, as that statute is no longer in existence. People ex rel. Newburgh Savings Bank v. Peck, 477.

See **Constitutional Law.**
Transfer Tax.

TENDER.

See **Sale.**

TORT.

See **Negligence.**

TOWNS.

See **Highways.**
Taxes.

TRADEMARKS.

See **Partnership.**

TRANSFER TAX.

1. Mutually acknowledged relation of parent.— Proof that a childless widow, who died in 1895, took charge in 1882, at the request of their general guardian, of her two orphan nieces, aged respectively ten and five years, at their own residence, which she leased and where she furnished board to them at unusually high rates; that each niece possessed a substantial estate against which, in the case of each, the widow charged every expense; that from 1885 to 1891 she herself was the guardian of the person and estate of each; that, until the marriage of the elder niece in 1890, when she left the widow, all resided together, except during periods spent by the nieces at boarding school, to which they were sent by the widow at their own expense, and that she had never held them out to the public as her children, although she often addressed them as "My dear girls," is insufficient to establish the widow "in the mutually acknowledged relation of a parent" to the nieces, for the term of ten years, necessary to exempt them from paying the transfer tax (Laws of 1892, chap. 399, § 2) upon legacies made by her to them. Matter of Birdsall, 180.

2. Gifts inter vivos, made in contemplation of death.— Deeds of real property valued at $216,550, executed and delivered to her nieces without consideration, by a testatrix aged seventy-nine, and under the care of a

physician for the disease of consumption from which she knew she would never recover, at a period only eight days before her death, are to be regarded as gifts inter vivos, "made in contemplation of the death" of the donor, within the meaning of the Taxable Transfer Act (Laws of 1892, chap. 399, § 1, subd. 3), and the property transferred is taxable; and this although the testatrix had by her will, made a few months previously, constituted the nieces residuary legatees of practically the same property. Id.

3. **Gifts inter vivos.**— Gifts made by a testator, aged eighty-four years, more than two years before his death, to each of his three children, of securities amounting to half a million dollars, followed by their subsequent absolute possession and custody of the securities, their receipt of the dividends which subsequently accrued, the increased assessment of two of the donees for personalty and a large reduction in that of the testator, are not within the provisions of the Tax Law (Laws of 1896, chap. 908, § 220, subd. 3), enacting that a transfer by a "gift made in contemplation of the death of the * * * donor, or intended to take effect, in possession or enjoyment, at or after such death" is taxable. Matter of Spaulding, 420.

TRESPASS.

See **Costs.**

TRIAL.

1. **Charge of an abstract proposition—General exception.**—Where, upon the trial of an action, the court, while dealing with requests to charge, makes a statement which is correct as an abstract proposition of law, but which, under the circumstances, may have had a tendency to mislead the jury, the defeated party cannot obtain a new trial upon a mere general exception taken to the statement, as it is his duty to go farther and request that the statement be qualified by an instruction limiting the rule to its proper application. Gilroy v. Loftus, 105.

2. **Effect of failing to move to dismiss the complaint at the end of the whole case.**—Where no motion is made to dismiss the complaint in an action at the close of the whole case, the defendant admits that there is a question for the jury, and also waives the objections which he made upon his motion to dismiss the complaint. Dunham v. Harlam, 318.

3. **Motion to dismiss the complaint.**— An exception, to the denial of a motion to dismiss the complaint, is untenable, if the facts supplied by the evidence, given after the plaintiff rested, and after the motion to dismiss was made, sufficiently support the action. Horowitz v. Pakas, 520.

4. **Right to close.**— Where the allegations of the complaint are admitted by the answer and the defense rests upon a counterclaim, the defendant is entitled to make the closing argument to the jury, and a denial of the privilege affects a substantial right. Staats v. Hausling, 526.

See **Appeal.**
Criminal Law.
Negligence.
New Trial.
Pleading.
Railroads.
Services.
Venue.

TRUSTEES.

See **Corporations.**
Will.

TRUSTS.

1. **Sale of corpus, to pay off incumbrances created by remaindermen, refused.**— The provisions of the Real Property Law (Laws 1896, chap. 547, § 85, as amended by Laws 1897, chap. 136) afford no authority to the court to permit a substituted trustee of an express trust in lands, created by a will containing no power of sale, to sell the corpus in order to pay off incumbrances which remaindermen have voluntarily and for their own purposes imposed upon their shares; and such a direction would be particularly indefensible where the effect of a sale would be, nominally, at least, to cut off the interests of contingent remaindermen in being, as

well as the interests of those not in being. Matter of Mills, 629.

2. Declaration of — Failure to inform the beneficiaries — Violative conveyance by the settlor — Knowledge of grantee — Liability for rents and profits.— Where a person duly executes and records a declaration of trust, which, however, reserves to the settlor a power to sell, invest and reinvest, stating that he for valuable considerations paid and received, will hold certain premises, purchased by him, in trust to pay the income to two persons living with him, a mother and son, during their joint lives, and that of the survivor and, upon the death of the latter, will convey the premises, or pay the proceeds of their sale, to the issue of the son, an absolute conveyance of the premises, made by the settlor after his constant retention of the declaration of trust and his failure to inform the beneficiaries of its existence during an ensuing period of sixteen years, to a third person, who is fully advised of the existence of the trust, and knows of the intention of the settlor to divert the proceeds of the conveyance from the trust purposes, is void as to the son and he may, upon learning of the existence of the trust, compel the grantee of the settlor to convey to a new trustee, who shall hold the premises for the purposes of the trust, and may also compel the grantee to account for the rents and profits of his occupation. Moloney v. Tilton, 682.

UNDERTAKING.

1. Construction in favor of a surety — Estoppel.— An undertaking given on an appeal for a new trial in the County Court, which binds the sureties, in a certain penalty, to pay the "amount" of a judgment and interest recovered by the party successful in Justice's Court, "or so much thereof as may remain unsatisfied in case said appeal shall be dismissed, or if judgment shall be rendered against" the appellant "and execution issued thereon shall be returned wholly or partly unsatisfied," cannot be construed to make a surety liable to pay any more than the judgment and interest; nor can the fact that the respondent treated the undertaking as a stay, when it was insufficient for that purpose, entitle him, upon his recovery of a much larger sum upon the new trial in the County Court, to hold the surety for more than the judgment and interest. Hennion v. Kipp, 437.

2. Construction—Use of a stream for floating logs.—Where, after an action, brought by the plaintiff to restrain the defendants from floating logs down an alleged private stream in John Brown's tract, Herkimer county, has been decided in his favor and the stream has been declared to be his property, the defendants appeal and are, by the Appellate Division, subsequently allowed, as the only possible means of marketing a quantity of logs on hand, to float them down the stream upon giving to the plaintiff an undertaking securing him against "any and all damage and loss whatsoever," the sureties are liable for the fair value of the use of the stream, and the fact that it was not shown that the logs damaged the banks, or that the plaintiff could have rented the stream to others, is immaterial. DeCamp v. Bullard, 441.

UNDUE INFLUENCE.

See **Will.**

USURY.

Interest after maturity.— A note or other contract for the payment of money is not usurious and void for providing for the payment of more than statutory interest after maturity. Green v. Brown, 277.

See **Mortgage.**

VENUE.

Motion to change after stipulation to put a case over the term.— Where a case, already on the calendar, is put over the term, upon the request of the defendant, upon a written stipulation executed by his attorneys that the case be placed upon the calendar for the next term, the court will not entertain a subsequent motion, made by him, that the place of trial be changed for the convenience of witnesses, as it is too late for him

to repudiate the agreement upon which the case was put over the term. Rodie v. Verdon, 409.

VERDICT.

1. Conclusion.— Where there is a conflict in the evidence or when opposing inferences may be drawn from it, the verdict of the jury is conclusive. Leonard v. Crow, 516.

2. Failure to except.— Where the evidence, given upon the trial of an action, is conflicting and no exceptions are taken by the defendants, except to a refusal of the court to dismiss the complaint, a verdict for the plaintiff must stand. Kraetzer v. Thomas, 555.

VETERANS.

1. A tinsmith, paid by the day, may be removed arbitrarily.— The provisions of the Laws of 1886, chapter 119, as amended by chapter 577 of the Laws of 1892, providing that a veteran, who holds a salaried position, shall not be removed from it except for cause shown, and after a hearing had, do not apply to a tinsmith, a veteran appointed by a board of commissioners of charities and corrections and paid at a per diem rate. Nuttall v. Simis, 19.

2. Not liable in tort for removing such a veteran.— *Semble*, that where such commissioners remove such an employee, they are not liable to him as for a tort, as they exercise quasi-judicial functions in determining whether or not he is a veteran, and their discharge of him from a position, for which he had no contract, is not a direct injury to his person nor to his estate. Id.

WARRANTY.

See Negotiable Instruments.

WATERCOURSES.

1. A single hydraulic work, constructed by a common grantor — Rights of grantees.— Where the common grantor of water powers upon a river, whose flow naturally passed in quantity along only one of its two channels, has, more than fifty years ago, with a view to equalizing the flow and power, dammed the entire river by three dams stretching from shore to shore and connecting two islands, the whole construction must be considered one hydraulic work to the maintenance of which, in its existing condition and height, all the grantees are, by prescription, entitled and their grants must be satisfied in the order of their priority. Dexter v. Jefferson Paper Co., 390.

2. Title by prescription — Nonuser.— The right to use water can be acquired by prescription only through an adverse user, for more than twenty years, under a claim of right, and owners of one of the islands, upon which one of the dams abutted, acquire, by nonuser, no prescriptive right to the use of the water in the one-half of the channels which pertain to the island. Id.

WILL.

1. Devise for charitable purpose — Equitable conversion — Suspension of power of alienation—Chapter 360, Laws of 1860.— The will of a testator, dated September 15, 1893, devised his residuary estate, consisting of real and personal property, to trustees to found, erect and maintain the Graves Home for the Aged, "for those who by misfortune have become incapable of providing for themselves and who have slender means of support," and he "authorized and empowered" them to sell and convey all or any of his real estate. A subsequent provision, after authorizing his executors and trustees to retain his stock in a banking company, and to continue the business of banking "for a term of years in their discretion," directed "but the same is not to be continued nor any portion of my property held longer than the lives of Catherine Graves, Roby and Helen Breeze Graves." The testator died July 21, 1896, and left a widow but no descendants. The personal property was insufficient to pay the debts and legacies. In an action for a construction of the will brought by the heirs-at-law and next of kin, Held, that there was an equitable conversion of the real estate into personal

property; that the title to it vested in the trustees absolutely; that the devise was limited by two lives in being, constituted a valid method by which the trustees might work out and provide a private charity, and was not void for the indefiniteness of the beneficiaries. That chapter 360 of the Laws of 1860, forbidding a testator to give under certain circumstances more than one-half of his estate to certain corporations and associations, had no application, as that statute applied only to the corporations and associations which were incorporated under that act. Allen v. Stevens, 158.

2. Chapter 360, Laws of 1860 — Relatives, not named in chapter 360 of the Laws of 1860, could not avail themselves of the act, although its application would benefit them. Id.

3. Validity — Indefiniteness of beneficiary. — That the provisions of chapter 701 of the Laws of 1893, taken in connection with the Real Property Law (Laws of 1896, chap. 547, § 93), and enacting, in substance, that a gift should not fail for the indefiniteness or uncertainty of the beneficiaries, supported the validity of the devise. Id.

4. Bequests for charitable purposes made within two months of testator's death. — The provisions of section 6 of chapter 319 of the Laws of 1848, invalidating devises and bequests to institutions or corporations formed under the act, unless the will in which they were contained was made and executed at least two months before the death of the testator, have no application to a will executed, within the prohibited period, by which a testator gives his residuary estate, consisting of real and personal property of the value of $500,000, to Yale University, a foreign corporation, authorized by chapter 128 of the Laws of 1881, to take real property by gift or devise within this state. Matter of Lampson, 199.

5. Right of a foreign corporation to take a bequest, made within two months of the death of the testator, as affected by the General Corporation Law and the Membership Corporations Law. — Neither the provisions of the General Corporation Law (Laws of 1890, chap. 563) nor those of the Membership Corporations Law have in any manner extended the restriction contained in section 6 of chapter 319, Laws of 1848, so as to make it applicable to foreign corporations which have no similar restrictions in their charters; nor is there any general legislative policy hostile to bequests made to foreign corporations within two months of the death of the testator. Id.

6. Public policy. — The fact that, since the enactment of the Membership Corporations Law, the legislature has granted charters to several charitable institutions without imposing the two months' limitation, and has, in other instances, removed similar restrictions, affords strong evidence that there is no general public policy against such bequests. Id.

7. Classification of corporations — Jurisdiction of Surrogate's Court over bequests. — The classification of corporations, and the jurisdiction of the Surrogate's Court to determine the validity of bequests, discussed. Id.

8. Construction of — "Heirs" — Partition. — Where a will, devising both real and personal property and excluding from its benefits a daughter and a grandchild, contains a provision that "upon the death of my wife, if she should die without having again married, that then my said real and personal estate shall be equally divided, share and share alike, between my wife's children and my children then living, or their heirs," the word "heirs" is not to be deemed to have been used in its legal and technical sense, but in the sense of issue or descendants; and a division or distribution, made by means of an action of partition brought after the death of the wife, should be confined to the persons who came within the description of issue or descendants of the testator or of his wife, at the date of her death. Schwencke v. Haffner, 293.

9. Trustees are not absolutely required to apply the whole net income of an infant to her support, although a will so directs. — Where the will of a testator directs his trus-

tees to apply the net income of the share of his infant child to her support, maintenance and education until majority, the trustees are not bound to apply the whole net income to such uses, without reference to the amount of the income or to the needs of the infant or to the circumstances under which she is being maintained; and upon application made to the surrogate, he will authorize such an allowance as he deems proper, having in view the circumstances, needs and station of the infant. Matter of McCormick, 309.

10. Bequest for masses — Indefiniteness of beneficiary — Purpose not religious, within Laws 1860, chapter 360 — A conditional legacy to an individual.— A bequest by a testatrix "to the priest of St. Mary's Church of Lancaster, New York, for which masses shall be said for the repose of my soul, and that of my husband, and all my relatives and benefactors" is not, in view of the provisions of section 1 of chapter 701 of the Laws of 1893, void for the indefiniteness of the beneficiary; nor is it a bequest for a religious purpose, within the meaning of chapter 360 of the Laws of 1860; but is, in effect, a conditional legacy, given to the individual who, at the time of the death of the testatrix, should be exercising pastoral functions at the church designated and to which he, as an individual, will become absolutely entitled upon showing that he has said the masses in question. Matter of Zimmerman, 411.

11. Undue influence.— Undue influence cannot be assumed and must be proved; and proof that an aged woman of independent mind deputized her agent, who was also her residuary devisee and executor, to employ attorneys to draw her will by which she devised the bulk of her property to a nephew, an especial favorite of the testatrix and who had been reared by her and her deceased husband, that, after the will had been prepared by the attorneys, she had it in her possession for some time, but did not change it, and that it made some provision for ten out of fourteen of her relatives, does not indicate that the will resulted from undue influence exercised upon her by the agent. Matter of Rohe, 415.

12. Spiritualism.— The mere fact that an aged woman is a spiritualist does not render her incapable of making a will, where there is no proof that it was the result of such influences. Id.

13. When an annuity, not charged on realty, does not lapse upon a division directed to be made.— Where the will of a testator of large means, although failing expressly to charge upon his real estate a small annuity given to an executor for life, devises his residuary real estate to his executors with directions to them to pay the annuity out of the rents and profits and also to invest any surplus income, a further provision that all the real estate should be divided among his children and grandchildren when a certain child named should reach majority is not, in the absence of proof that there is no surplus income applicable to the payment of the annuity, to be taken as fixing the date when it shall cease, and the evident intention of the will that the annuity shall continue during the life of the executor will be respected. Dunham v. De Raismes, 568.

14. A bequest of real estate not transferring to the legatee mortgages upon it owned by the testator.— A provision contained in the will of a testator that "As my wife, Jane G. Miller, has in her own name real estate which was earned by her and myself together, I hereby give, devise and bequeath to her all my right and interest therein and request her to release her right of dower in my residuary estate," does not transfer to the wife the interest of the testator in bonds and mortgages originally given by him and his wife and assigned to him several years after he made his will; but they are enforcible against her only to the extent of one-half of their amount. Miller v. Miller, 582.

15. Dower — Election.— The request of the testator, that the wife will release her dower in the residuary estate, does not put her to an

election, as mere precatory words are insufficient for that purpose; the rule being that in order to compel an election, it must appear that the testamentary provision was intended to be in lieu of dower. Id.

16. **Contingent remainders — Vesting — Distribution.**—Where the will of a testator, after devising his estate to trustees with directions to them to divide it into five equal parts and pay the income of each share to one of his five brothers and sisters for life, declares in substance, that the interest of a life tenant, dying without issue, shall pass per stirpes to the lawful issue of the other brothers and sisters, except that in the case of the death of one sister her son by her former marriage and his issue should alone inherit, the death of this son, without issue and before his mother, does not render the share, which upon the death of the life tenant of another share, he would otherwise have taken, undevised assets to be distributed among the next of kin of the testator, but it should be added to the other residuary shares, as the intention of the testator manifestly was that the beneficiaries should take only future contingent remainders, divisible among them as a class upon the death of a life tenant without lawful issue. Monson v. Paine, 639.

17. **Construction — Intestacy to be avoided.**— A will should be construed as to avoid intestacy; and a construction, not necessary, should be condemned where it would have the effect of allowing a person to take who was expressly excluded from any benefit under the will and where it would also enlarge certain life estates into fees. Id.

18. **Construction as to a distribution.**— Where a will directs that a sum of money shall be distributed by executors among the nephews and nieces of the testator upon the ratio which the number of children and grandchildren of each nephew and niece bears to the total number of the children and grandchildren of all the nephews and nieces, nephews, who have neither children nor grandchildren, take nothing. Ellis v. Granger, 656.

19. **Bequest of more than one-half of an estate to charitable, etc., corporations — Status of foreign corporation.**— A testator is prohibited from devising to any corporation, which comes within the definition of chapter 360 of the Laws of 1860, more than one-half of his property, and this, regardless of the status of the corporation, either as to the provisions of its charter or as to the laws of the state of its domicile; as the prohibition of the statute is directed against the testator and not against the corporation. Scott v. Ives, 749.

20. **Declarations of a wife to an attorney that she would not contest her husband's will — Code of Civil Procedure, section 829.**— Proof, that, after a testator had been informed by his attorney that he had made a will which offended against chapter 360 of the Laws of 1860, his wife was summoned, that the imperfections of the will were explained to her and that she, after objecting to the provision made for her, told the attorney that she would not contest the will and that he, about the same time, prepared a codicil which cut off her bequests if she made a contest, does not establish any valid agreement upon her part not to contest the will, nor one made upon a valid consideration; and the evidence of the attorney, as to the wife's declarations, is, as a privileged communication, properly excluded under section 829 of the Code of Civil Procedure. Id.

21. **What is a contest of a will — Estoppel of beneficiary by conduct.** — Proof, that a widow did not contest a will and codicil of her husband when they were offered for probate, that she continued to live in a house upon a farm in which she had been devised a life interest, that, in the absence of action by the executor, she made arrangements for the occupation of the farm by a tenant, that she accepted, but without prejudice to her rights to contest the will, some semi-annual payments of an annuity given her by it, and that, upon being made a defendant in an action brought by the executor to construe the will, she raised the question whether it was

valid under chapter 360 of the Laws of 1860, does not establish the fact that she has contested the will and, by its terms, has thereby precluded herself from taking under it; nor has she estopped herself, by her conduct, from questioning the validity, under said statute, of certain bequests to religious, charitable, etc., institutions. Id.

See **Partition.**
Statutes.

WITNESS.

Evidence — Opinions of experts. — Where the facts, upon which a medical witness bases his opinion, are not communicated to the jury, he cannot be permitted to testify that, in his opinion, the injuries which a person has sustained will be permanent. McCabe v. Third Avenue Railroad Co., 707.

See **District Courts.**

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